Supreme Court, U.S.
FILED
JUL 12 2000
OFFICE OF THE CLERK

No. 00 78

IN THE

# Supreme Court of the United States

October Term, 1999

JOSEPH M. ANDERSON,

*Petitioner,*

vs.

NIAGARA MOHAWK POWER CORPORATION,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FOURTH JUDICIAL DEPARTMENT.

## PETITION FOR WRIT OF CERTIORARI

JOSEPH E. ZDARSKY, ESQ.
*Counsel of Record*
ZDARSKY, SAWICKI & AGOSTINELLI
GERALD T. WALSH, ESQ., *Of Counsel*
404 Cathedral Place
298 Main Street
Buffalo, New York 14202
Telephone: (716) 855-3200

*Attorneys for Petitioner*

BATAVIA LEGAL PRINTING, INC.—Telephone (716) 768-2100

4/8 pp

## QUESTION PRESENTED

Whether a state appellate court's summary dismissal of a Native American's damages claim against a non-Indian corporate party because he failed to join a sovereign Indian Nation undermines Congress' express grant of jurisdiction to New York courts over private civil disputes between Indians and non-Indians (25 U.S.C. §233), violates the Supremacy Clause (Article VI, Cl.2 ) of the United States Constitution, or deprives Native Americans of due process or equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the United States' Constitution?

## LIST OF PARTIES

Petitioner Joseph M. Anderson, a member of the Tuscarora Nation of Indians, owns and operates retail, wholesale and manufacturing businesses on the Tuscarora Indian Reservation.

Respondent Niagara Mohawk Power Corporation, is a publicly regulated utility electric and gas corporation, organized under the New York Transportation Corporations Law, which maintains and operates electrical distribution facilities on the Tuscarora Indian Reservation.

Pursuant to 25 U.S.C. §233, in August 1994, Anderson commenced a civil action in New York State Supreme Court against Niagara Mohawk Power Corporation for money damages for breach of a December 27, 1993 electric service contract.

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF AUTHORITIES ..... iv

PETITION FOR WRIT OF CERTIORARI ..... 1

OPINIONS BELOW ..... 2

JURISDICTION ..... 2

STATUTE INVOLVED ..... 3

STATEMENT OF THE CASE ..... 5

1. Facts ..... 6

2. Proceedings ..... 9

REASONS FOR GRANTING THE WRIT ..... 12

I. The Appellate Division's Dismissal Order Undermines 25 U.S.C. §233, Congress' Express Grant of Jurisdiction to the Courts of New York State to Hear Civil Disputes Involving Indians, and Raises Substantial Supremacy Clause and Due Process Concerns ... 12

II. The Appellate Division's Order Conflicts with Federal Circuit Courts of Appeals Decisions Construing Congressional Grants of Jurisdiction On Indian Lands ..... 16

Page

III. The Appellate Division's Order, If Allowed to Stand, Would Result in a Jurisdictional Void for Persons and Firms Engaged in Commerce on Indian Lands ..... 18

CONCLUSION ..... 20

APPENDIX:

Order of the Court of Appeals of the State of New York, Dated April 13, 2000 ..... A1

Order of the Appellate Division, Fourth Judicial Department, Entered December 30, 1999 ..... A2

Order of the Appellate Division, Fourth Judicial Department, Entered October 1, 1999 ..... A3

Memorandum Decision of the Appellate Division, Fourth Judicial Department, Entered October 1, 1999 ..... A3

Order of Honorable Norman E. Joslin, J.S.C., Granted December 9, 1998 ..... A5

Letter Dated December 27, 1993, Re: Electric Service Proposal ..... A8

Letter Dated January 6, 1994, From Gerald N. O'Neill to Chief Leo Henry ..... A12

Letter Dated January 17, 1994, From John W. Keib to Joseph E. Zdarsky ..... A14

Decision of the New York State Public Service Commission, Dated April 19, 1995 ..... A16

## TABLE OF AUTHORITIES

Page(s)

**FEDERAL CASES:**

*Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir.2000) ..... 16

Boddie v. Connecticut, 401 U.S. 371 (1971) ..... 15

*Bowen v. Doyle*, 880 F. Supp. 99 (W.D.N.Y. 1995) ..... 12

*Bryan v. Itasca County*, 426 U.S. 373 (1976) ..... 12

*Davis v. United States*, 192 F.3d 951 (10th Cir. 1999) ... 17

*Griffin v. Illinois*, 351 U.S. 12 (1956) ..... 15

*Katzinger v. Chicago Metallic Mfg. Co.*, 329 U.S.394 (1947) ..... 18

*Kosgdar v. National Cash Register*, 417 U.S. 62, 65 (1974) ..... 19

Niagara Mohawk Power Corporation v. Tonawanda Band of Seneca Indians, 94 F.3d 747 (2d Cir.1996) ..... 7

*Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999) ... 17

*United States v. Forness*, 125 F.2d 928 (2d Cir.1942) ... 12

*Williams v. Lee*, 358 U.S.217 (1959) ..... 18,19

*Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) ..... 18

**STATE CASES:**

*Anderson v. Niagara Mohawk Power Company*, 265 A.D.2d 817, 696 N.Y.S.2d 736 (4th Dept. 1999) *leave to appeal denied* 94 N.Y.2d 764, __N.Y.S.2d___,___ N.E.2d ___ (N.Y. April 13, 2000) ..... 2

**Page(s)**

*Anderson v. Town of Lewiston*, 244 A.D.2d 965, 665 N.Y.S. 2d 164 (4th Dept. 1997), *appeal dismissed* 91 N. Y. 2d 920 (1998) ..... 13,14

*Niagara Mohawk Power Corporation v. Anderson*, 258 A.D.2d 958, 685 N. Y. S. 2d 502 (4th Dept.) *motion for leave to appeal dismissed*, 93 N.Y.2d 958 (1999) ..... 13,14

**FEDERAL STATUTES:**

25 U.S.C. §233 ..... *Passim*

28 USC §1257(a) ..... 2

Act of September 13, 1950, c.947, §1, 64Stat.845 (1950) ..... 3

**STATE STATUTES:**

New York CPLR 1001 ..... 11

New York CPLR 1001(b) ..... 11

**FEDERAL LEGISLATIVE HISTORY:**

1950 U.S. Code Cong. Service, p.3731 ..... 12

Congressional Record, 81st Congress, 2nd Session, pp.12453-63 (House Debate on Conferring Jurisdiction on New York Courts, August 14, 1950) ..... 12

**MISCELLANEOUS:**

*Niagara Mohawk Power Corporation v. Eastern Area Director, Bureau of Indian Affairs*, 32 IBIA 276 (IBIA 96-54-A, July 23, 1998) ..... 7

## PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph M. Anderson respectfully prays that a writ of certiorari issue to review the order of the New York Supreme Court, Appellate Division, Fourth Department, entered in this action on October 1, 1999. The instant case concerns an Indian's right to sue a New York corporation for money damages in New York State Supreme Court. Despite a federal statute (25 U.S.C. §233) specifically granting New York courts jurisdiction over civil actions between Indians and non-Indians, the Appellate Division of the New York State Supreme Court, Fourth Department, held that plaintiff cannot proceed with his breach of contract action against a New York public utility because he did not and cannot join the Tuscarora Nation of Indians as a party. The Appellate Division's decision undermines Congress' statutory grant of jurisdiction to New York courts, which was not conditioned on joinder of sovereign Indian Nations. The Court should grant a writ of certiorari to consider the important civil rights issues implicated by the Appellate Division's dismissal order - equal access to justice, due process, and enforcement of contract rights - issues of critical importance to Native Americans and all those transacting business with Native Americans.

## OPINIONS BELOW

On April 13, 2000, the New York State Court of Appeals denied the petitioner's motion for leave to appeal from the order of the Appellate Division, Fourth Department.

The New York Court of Appeals' decision denying discretionary review of the Appellate Division's order is reproduced at Appendix p. A1 and is reported at 94 N.Y.2d 764, __ N.Y.S.2d ___, ____ N.E.2d ___ (N.Y. April 13, 2000).

The Appellate Division, Fourth Department denied Anderson's motion to reargue or for leave to appeal to the New York Court of Appeals, in an unreported order issued December 30, 1999, reproduced at Appendix p. A2. On October 1, 1999, the New York Supreme Court, Appellate Division, Fourth Department, dismissed Anderson's complaint for failure to join the Tuscarora Nation. The Appellate Division's memorandum decision, reported at 265 A.D.2d 817, 696 N.Y.S.2d 736 (4th Dept. 1999), is reproduced at Appendix pp. A4. The unreported order of the New York Supreme Court, Niagara County, entered December 10, 1998, denying Niagara Mohawk's motion for summary judgment and to renew its motion to dismiss for failure to join the Tuscarora Nation as a party, is reproduced at Appendix pp. A5-7.

## JURISDICTION

The order of the New York Court of Appeals denying discretionary review was entered on April 13, 2000. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(a).

## STATUTES INVOLVED

Section 233 of Title 25 of the United States Code (1983 main volume) Act of September 13, 1950, c.947, §1 64 Stat.845 (1950), provides as follows:

§233. Jurisdiction of New York State courts in civil actions.

> The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: Provided, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: Provided further, That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: Provided further, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any

judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: And provided further, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: Provided further, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.

## STATEMENT OF THE CASE

On August 17, 1994, Petitioner Joseph Anderson sued Respondent Niagara Mohawk Power Corporation in New York State Supreme Court, seeking money damages for breach of contract. In a second cause of action, Anderson sought damages resulting from Niagara Mohawk's breach of its duty to provide electric service in a nondiscriminatory fashion, in violation of its published tariffs and the statutes which govern its conduct as a public utility (Record on Appeal, hereinafter "R." at 41-55, 255-261).

Anderson's claims are based on Niagara Mohawk's breach of a written December 27, 1993 contract to provide expanded electric service to Anderson's business on New York State Route 31 on the Tuscarora Indian Reservation. No relief is sought from the Tuscarora Nation. No interest was cited by the Tuscarora Nation that would in any way prevent the parties from adjudicating Anderson's claim for money damages (R. 269-275). In fact, there is absolutely nothing in the record to indicate that the Tuscarora Nation ever opposed Anderson's request for expanded service. No findings were made by the Appellate Division to demonstrate how a money judgment against Niagara Mohawk could inequitably affect the Tuscarora Nation.

**1. Facts**

In 1993, Anderson began a commercial expansion project, adjacent to his existing Route 31 business, including construction of a car wash and site preparation for an expanded retail plaza, which required additional electric service from Niagara Mohawk (R. 255-257).

On December 27, 1993, Niagara Mohawk entered into a written agreement with Anderson to upgrade the electric service at his business (R.169-276). Although Niagara Mohawk waived certain customer charges due to the expected revenue from the expanded service, the contract obligated Anderson to hire his own electrical contractor at considerable expense to install a new transformer pad and curb, conduit and wiring, an electrical switching station, and associated equipment to service the car wash and planned retail expansion (R.256-259, 262-267). The December 27, 1993 electric service contract is reproduced at Appendix, pp. A8-A11.

Niagara Mohawk provided service on the Tuscarora reservation for years without incident, and has continued to provide electrical power on the reservation to most Tuscarora customers (R. 283,310, 372-373). Beginning in August, 1993, prior to the agreement with Anderson, defendant's representatives met and exchanged correspondence with Leo Henry and Kenneth Patterson, Tuscarora chiefs who expressed concerns about non-Tuscaroras receiving electric service without their consent (R. 36-37,145-146,160). In November, 1993, defendant sought advisory relief from the New York Public Service Commission regarding service on Indian reservations (R. 169-206). Tuscarora Chiefs Webster Cusick and Arnold Hewitt advised Niagara Mohawk that one or two chiefs could not dictate who would receive electric service on

the reservation, without a consensus achieved by the Council, and that no official action of the Tuscarora Council of Chiefs had been adopted to change the status quo (R. 167-168,283,314,434-463).

Niagara Mohawk unilaterally announced in a January 6, 1994 letter to Tuscarora Chief Leo Henry (reproduced at Appendix, A12-13) that it would not provide any new or upgraded service on the Tuscarora Reservation.

Thus, less than two weeks after Niagara Mohawk contracted to provide Anderson with electric service for his business expansion, Niagara Mohawk (over the objection of Tuscarora Chiefs) determined that it would not provide any new or upgraded service on the Tuscarora Reservation, vitiating any alleged tribal consent provision (R. 390, 167-68, 285). The gist of Anderson's complaint is that Niagara Mohawks breached its contract by making a business decision to institute its "no new service policy." Instead of fulfilling its contract with plaintiff, and providing service on demand, as it had done for 60 years at Tuscarora, Niagara Mohawk sought advisory opinions from federal district court and the New York Public Service Commission (Appendix A14-15). Niagara Mohawk's federal suit against officials and members of the Tonawanda Seneca Nation was dismissed for lack of subject matter jurisdiction and failure to plead a justiciable controversy. *See, Niagara Mohawk Power Corporation v. Tonawanda Band of Seneca Indians,* 94 F.3d 747 (2d Cir.1996). The PSC petition for administrative reformation of Niagara Mohawk's franchise agreement also backfired, ultimately leading to a determination that its Indian franchise agreements were void (R.66-68, 642-655). *See, Niagara Mohawk Power Corporation v. Eastern Area Director, Bureau of Indian Affairs,* 32 IBIA 276 (IBIA

96-54-A, July 23, 1998). The New York PSC's decision outlining Niagara Mohawk's request for reformation of its Indian franchise agreements is reproduced at Appendix pp.A16-21. Niagara Mohawk continued to provide electricity to existing customers and sent its service trucks onto Tuscarora lands on a daily basis (R. 258-59, 283, 286, 310, 349, 362-383). To add insults to injury, Niagara Mohawk made several *ad hoc* exceptions to its "no new service" policy to hook up other Tuscarora customers (380-388) and even sued Anderson's brother and other Tuscarora citizens, claiming interference with its contract and franchise rights at Tuscarora to provide new service to a state affiliated reservation school, while at the same time contending that it was "impossible" to perform its contract with Anderson (R. 551-568).

In late 1993 and early 1994, Niagara Mohawk exchanged and approved technical drawings and proposals with Anderson's agents and electrical contractors in furtherance of the contract and Anderson completed the site work, constructed the transformer pad, installed the switching station and invested substantial funds, all with Niagara Mohawk's knowledge and approval (R. 258,362-366). At the last minute, Niagara Mohawk refused to connect the service line (R.259, reproduced in the Appendix hereto at pp. A14-15), relying on its January 1994 policy decision not to provide new or upgraded service at Tuscarora.

Anderson sued Niagara Mohawk to recover damages for: (i) construction and acquisition expenses incurred in connection with the stalled development, (ii) additional costs incurred to provide alternative power; and (iii) lost profits resulting from Niagara Mohawk's failure to provide electric service (R.45-48, 260).

**2. Proceedings**

In December 1994, the New York Supreme Court, Niagara County, denied Niagara Mohawk's motion to dismiss for failure to join the Tuscarora Nation as a necessary party (R.464-65). In November 1996, the Appellate Division, Fourth Department denied Niagara Mohawk's motion to reinstate its appeal of the trial court's order, after the appeal had been dismissed for failure to prosecute (R. 468).

After discovery closed and a trial date was set, Niagara Mohawk moved for summary judgment and to renew its motion to dismiss for failure to join the Tuscarora Nation as a party. On December 10, 1998, the New York Supreme Court, Niagara County, denied both defense motions (Appendix A5-7).

On October 1, 1999, the Appellate Division, Fourth Department, reversed the trial court's order. The Appellate Division's October 1, 1999 memorandum decision and order granted Niagara Mohawk's motion to renew, and upon renewal, granted the defendant's motion to dismiss the complaint for failure to join the Tuscarora Nation as a necessary party, without addressing the merits of the motion for summary judgment (Appendix A3-4).

On December 30, 1999, the Appellate Division, Fourth Department denied Anderson's motion for leave to reargue, or for leave to appeal to the New York Court of Appeals (Appendix A2). Anderson's motion for leave to appeal directly to the New York Court of Appeals was denied in an order entered by the Court of Appeals on April 13, 2000 (Appendix A1).

No hearings were ever held in this matter. In response to Niagara Mohawk's initial motion to dismiss (R. 464) and its 1998 motion to renew, Anderson asserted to the trial court in briefs, affidavits and at oral argument that compulsory joinder of the Tuscarora Nation was not required and conflicted with the federal statute granting New York State courts jurisdiction to hear disputes between Indians and non-Indians (25 U.S.C. §233).

Since Anderson did not seek specific performance or injunctive relief, he argued that because the Tuscarora Nation has sovereign immunity, it could not be adversely affected by a money judgment against Niagara Mohawk. At the Appellate Division, Anderson again argued that Congress' statutory grant of jurisdiction to New York courts to resolve civil disputes on Indian Reservations was not conditioned in any way on joinder of sovereign nations. March 31, 1999 Brief for Plaintiff-Respondent Joseph M. Anderson, at pp. 2, 15-19. The same arguments were raised on motions to reargue in the Appellate Division, and on Anderson's application for discretionary review by the New York Court of Appeals. *See,* Anderson's February 2, 2000 Statement in Support of Motion for Leave to Appeal to the Court of Appeals at pp.3, 10-16; November 5, 1999 Affidavit of Gerald T. Walsh in support of Anderson's Motion to Reargue and for Leave to Appeal to the Court of Appeals, at pp.3-10, reproduced at pp.A12-A19 of Petitioner's Motion to the Court of Appeals.

The trial court, on two occasions, exercised its statutory discretion under New York CPLR 1001, to deny Niagara Mohawk's motion to dismiss the action for failure to join the Tuscarora Nation (R. 2, 464-65, Appendix A5-6). Under CPLR 1001(b), before dismissing an action for nonjoinder, the court must consider five factors: whether the plaintiff has another effective remedy if the action is dismissed; any prejudice which may accrue; whether prejudice might be avoided; the feasibility of a protective provision; and whether an effective judgment may be rendered. None of these factors were discussed by the Appellate Division.

Because Anderson's action for damages against Niagara Mohawk cannot impact the Tuscarora Nation, Anderson submits that the defendant's motion to dismiss for failure to join the Tuscarora Nation was properly denied in December 1994 by the trial court, the appeal of that order was correctly dismissed by the Appellate Division, Fourth Department in November 1996 and the trial court properly denied re-argument or renewal on December 10, 1998.

## REASONS FOR GRANTING THE WRIT

### I. The Appellate Division's Dismissal Order Undermines 25 U.S.C. §233, Congress' Express Grant of Jurisdiction to the Courts of New York State to Hear Civil Disputes Involving Indians, and Raises Substantial Supremacy Clause and Due Process Concerns.

The Court should review the Appellate Division's order because it undermines Congress' intent to resolve jurisdictional ambiguities in civil matters arising on Indian lands.

The Appellate Division's decision nullifies Congress' express grant of jurisdiction pursuant to 25 U.S.C. §233, and other similar civil jurisdictional statutes involving Indian lands, by requiring joinder of Indian Nations to private civil disputes. Congress' jurisdictional grant would be hollow if either Indian or non-Indian defendants could evade the law simply by demanding that state courts require joinder of a tribe as a necessary party, no matter how remote a tribe's assertion of an interest in the outcome.

Congress enacted 25 U.S.C. §233 to resolve jurisdictional ambiguities for resolving private civil disputes involving New York Indians. *See, Bowen v. Doyle,* 880 F. Supp. 99, 120-21 (W.D.N.Y 1995) [reviewing legislative history demonstrating Congress' intent to remedy the jurisdictional void created by *United States v. Forness,* 125 F.2d 928 (2d Cir.1942)]; *see also* 1950 U.S. Code Cong. Service, p.3731; Congressional Record, 81st Congress, 2nd Session, pp.12453-63 (House Debate on Conferring Jurisdiction on New York Courts, August 14, 1950). In *Bryan v. Itasca County,* 426 U.S. 373, 383 (1976), this Court held that Public Law 280, the equivalent of 25 U.S.C. §233 in several Western and Midwestern states, acknowledged

Congress' intent to remedy the lack of adequate opportunities for Indians to resort to court to seek redress of wrongs.

It is hard to imagine how the Tuscarora Nation or any of its chiefs would be inequitably affected by a judgment for money damages against Niagara Mohawk. No tribal resolution or affidavit by a tribal official, or any evidence whatsoever was offered to demonstrate that the Tuscarora Nation would be adversely affected by a money judgment against Niagara Mohawk. Indeed, in the instant action, there is no evidence in the record to show any indication that the Nation did not consent to Anderson's contract for expanded service at his Route 31 location. The only evidence in the record on this point, the sworn testimony of Tuscarora Chief Webster Cusick, is directly contrary to Niagara Mohawk's position (R.434-463).

The instant case does not concern title to land on the reservation, or require specific performance of certain acts on the reservation. *See, e.g. Anderson v. Town of Lewiston,* 244 A.D.2d 965 (4th Dept. 1997) (request for injunctive relief and specific performance of the Town of Lewiston's agreement to provide water service). Here, Niagara Mohawk made a business decision not to abide by its contract with Anderson, but chose instead to provide service to other Tuscarora Indians on a discriminatory basis.

The Appellate Division's memorandum decision is devoid of analysis and follows a pattern established in two other recent Fourth Department memorandum decisions involving civil disputes between Tuscarora Indians and non-Indians, neither of which were not ripe for review by the Court of Appeals, due to a lack of a final determination within the meaning of the New York Constitution in one case and lack of substantial constitutional question to justify a direct appeal in the other.

*See, Niagara Mohawk Power Corporation v. (Douglas) Anderson*, 258 A.D.2d 958 (4th Dept. 1999), *motion for leave to appeal dismissed*, 93 N.Y.2d 958 (June 8, 1999) due to lack of a final determination; *Anderson v. Town of Lewiston*, 244 A.D.2d 965 (4th Dept. 1997), *appeal dismissed* 91 N.Y.2d 920 (1998), for lack of a substantial constitutional question.

In the *Town of Lewiston* case, the Court of Appeals' order dismissing the plaintiff's direct appeal was never served by the Town with notice of entry, thus plaintiffs' time to move for leave to appeal never started running. The Town of Lewiston never followed through on a threat to shut off the plaintiffs' water in that case, thus rendering the injunction action moot with no controversy to present to the Court of Appeals. In *Niagara Mohawk Power Corporation v. Anderson, supra,* Niagara Mohawk sued Douglas Anderson and several other Tuscarora citizens for alleged interference with Niagara Mohawk's contract right to provide expanded electric service to a Tuscarora Reservation school. In that case, the Appellate Division affirmed Supreme Court's dismissal of counterclaims to compel Niagara Mohawk to provide service to a defendant and proposed intervenors who were unable to obtain electrical power. Notably, Niagara Mohawk did not join the Tuscarora Nation as a party to its claim against private Tuscarora citizens.

There is no tribal court at the Tuscarora Nation. The only judicial forum for resolution of the civil dispute between Anderson and Niagara Mohawk is the New York State Supreme Court, by virtue of Congress' express grant of jurisdiction in 25 U.S.C.§233. Review by the Court is appropriate because the Appellate Division's decision would interfere with the federal statutory scheme for resolving civil disputes on Indian reservations, a clear violation of the Supremacy Clause.

The Supremacy Clause forbids state courts to dissociate themselves from federal law or refuse to exercise jurisdiction bestowed by Congress because of disagreement with the federal law or refusal to recognize the superior authority of its source. *Howlett By and Through Howlett v. Rose*, 496.U.S. 356, 380 (195) (under the Supremacy Clause, state court could not refuse to hear a §1983 suit against a school board on the basis of sovereign immunity); *Testa v. Katt*, 330 U.S.386 (1947); *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876); *Mondue v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 58 (1912) ("the existence of jurisdiction creat[ed] an implication of duty to exercise it").

By blocking Anderson's access to court, the Appellate Division's order, if not reviewed by this Court, will deprive Native Americans of their Fifth and Fourteenth Amendment right to due process and equal protection of the laws, in contravention of the principles established by the Court beginning with *Griffin v. Illinois,* 351 U.S. 12 (1956), (access to appeals in criminal cases) and *Boddie v. Connecticut,* 401 U.S. 371 (1971), (access to the judicial process in civil cases). In *Boddie,* the Court held that states cannot shut the courtroom doors to indigent plaintiffs because the state has an ultimate monopoly of all judicial process and its enforcement machinery, as a practical matter, if disputes cannot be successfully settled between the parties, the court system is the only forum effectively empowered to settle their disputes. 401 U.S. at 378-379, 388. Given Congress' express jurisdictional mandate, New York's courts may not restrict a Native American's access to justice by invoking a procedural rule to mandate dismissal whenever an adverse party suggests a tribal interest might be affected.

The trial court determined that Anderson had raised genuine issues of fact to be resolved by a jury. Without any consideration of the merits of Anderson's claim, the Appellate Division's decision deprives Anderson of a meaningful opportunity to be heard. The courts of New York are bound to do equal justice under the law; the state may not make its judicial processes available to some, but deny them to others, based on wealth, the color of one's skin, or one's ethnic background. *Boddie v. Connecticut, supra,* 401 U.S. at 388 (Brennan, concurring). Since Congress refused in 25 U.S.C. §233 to condition a Native American's access to New York courts on tribal consent or joinder, Anderson was entitled to have his case decided on the merits.

**II. The Appellate Division's Order Conflicts with Federal Circuit Courts of Appeals Decisions Construing Congressional Grants of Jurisdiction on Indian Lands.**

The summary dismissal of Anderson's case conflicts with decisions of the United States Courts of Appeals for the Second Circuit, the Seventh Circuit and the Tenth Circuit. First, the Appellate Division's order conflicts with the Second Circuit Court of Appeals' holding in *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir.2000) that a tribe was not an indispensable party to a film producer's contract, tort, and copyright infringement claims. Notwithstanding the Mashantucket Pequot Tribe's sovereign immunity, the Second Circuit held in *Bassett* that the tribe was not indispensable to plaintiff's claims against a privately held Indian museum corporation and its individual administrators, including her effort to enjoin further showing of the subject film. Like the district court reversed in *Bassett,* the Appellate Division here failed to explain how the Tuscarora Nation's interest might be

harmed if a jury awarded money damages to Anderson and failed to consider that dismissal of Anderson's claim would prevent him from vindicating his rights against Niagara Mohawk in any forum.

Similarly, in *Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999), the United States Court of Appeals for the Seventh Circuit reversed a District Court order dismissing an action to challenge a tribal constitutional election for failure to join the tribal governing board as a necessary party. Even though the tribal governing board contended that the amendments proposed in the election dealt with matters of fundamental importance to the tribe's sovereign interests, the Seventh Circuit Court of Appeals held that the fact that a tribal governing body has an interest in litigation is not enough to make a necessary party and that the tribe was free to intervene in the case if it wished to do so. *Id.* at 668-669.

The Appellate Division's decision also conflicts with the Tenth Circuit Court of Appeals' holding in *Davis v. United States, 192 F.3d 951* (10th Cir. 1999) that the Seminole Nation was not *per se* an indispensable party to a claim by a purported member for a certificate of degree of Indian blood. The Court of Appeals in *Davis* reversed the district court's dismissal for failure to join the Seminole Nation as a necessary party.

Just as the Seventh Circuit Court of Appeals held in *Thomas, supra,* 189 F.3d at 668, that Congress' refusal to note the tribal interest in the federal tribal constitutional elections would permit actions challenging such elections to proceed without joining the tribal governing body, in the instant case, since Congress' refused in 25 U.S.C. §233 to condition access to New York courts on tribal consent or joinder, Anderson's

claims should have been determined on the merits. In light of the above cases, an Indian Nation is not *per se* an indispensable party to an action arising on an Indian Reservation. The Court should grant a Writ of Certiorari because the Appellate Division's decisions conflicts with Federal Indian Law. *See, Katzinger v. Chicago Metallic Mfg. Co.*, 329 U.S.394 (1947).

**III. The Appellate Division's Order, If Allowed to Stand, Would Result in a Jurisdictional Void for Persons and Firms Engaged in Commerce on Indian Lands.**

The instant case is the converse of *Williams v. Lee,* 358 U.S.217 (1959) where the Court reversed an Arizona court's exercise of civil jurisdiction over a Navajo reservation dispute in the absence of a federal statute like 25 U.S.C. §233. Although the prevailing rule since *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, (1832) had been that state courts may not exercise jurisdiction over Indian tribal affairs or claims arising on or relating to Indian tribal land, Congress, pursuant to Article I §8, cl. 3 of the Constitution, has the power to modify this rule: "[w]hen Congress has wished the States to exercise this power it has expressly granted them jurisdiction which *Worcester v. Georgia* had denied." *Williams v. Lee*, 358 U.S. at 221. The Court in *Williams v. Lee* cited 25 U.S.C. §233 as an example of a broad Congressional grant of civil and criminal jurisdiction. *Id.* Absent a similar Congressional grant of jurisdiction, the Court in *Williams* reversed the Supreme Court of Arizona's decision upholding state court jurisdiction over an Indian trader's suit for goods sold and delivered on the Navajo reservation. The Court granted certiorari because the Arizona decision was "a doubtful determination of the important

question of state power over Indian affairs." *Williams v. Lee,* 358 U.S. at 218.

By blindly invoking the necessary party doctrine, the Appellate Division has thwarted Congress' grant of jurisdiction under 25 U.S.C. §233. This court should grant a writ of certiorari to address the important question of whether state courts can evade the duty expressly bestowed upon them by Congress pursuant to 25 U.S.C. §233 and Public Law 280. As commercial enterprises continue to develop on Indian lands, individuals and firms transacting business on Indian lands need to know whether a forum exists to resolve their civil disputes. The Appellate Division's decision creates uncertainty where Congress had acted to remove it. The Court should review the Appellate Divisions order because it presents important questions regarding the accommodation of Federal and State power over Indian Affairs. *See, Kosgdar v. National Cash Register*, 417 U.S. 62, 65 (1974).

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: Buffalo, New York
July 11, 2000

Respectfully submitted,

JOSEPH E. ZDARSKY
*Counsel of Record*
Zdarsky, Sawicki & Agostinelli
GERALD T. WALSH, *Of Counsel*
404 Cathedral Place
298 Main Street
Buffalo, New York 14202
(716) 855-3200
*Attorneys for Petitioner*

# APPENDIX

**Order of the Court of Appeals of the State of New York, Dated April 13, 2000.**

STATE OF NEW YORK
COURT OF APPEALS

*At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirteenth day of April 2000.*

PRESENT, HON. JUDITH S. KAYE,
*Chief Judge, presiding.*

---

4-13 Mo. No. 164

Joseph M. Anderson,

*Appellant,*

v.

Niagara Mohawk Power Corporation,

*Respondent.*

---

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/ STUART M. COHEN
Stuart M. Cohen
Clerk of the Court

**Order of the Appellate Division, Fourth Judicial Department, Entered December 30, 1999.**

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

MOTION NO. 1124/99
DOCKET NO. CA 99-174

PRESENT: GREEN, J.P., LAWTON, PIGOTT, JR., SCUDDER AND BALIO, JJ.

---

JOSEPH M. ANDERSON,
*Plaintiff-Respondent,*

v.

NIAGARA MOHAWK POWER CORPORATION,
*Defendant-Appellant.*

---

Plaintiff having moved for reargument of, or in the alternative, leave to appeal to the Court of Appeals from an order of this Court entered October 1, 1999,

Now, upon reading and filing the affidavit of Gerald T. Walsh sworn to November 5, 1999, the notice of motion with proof of service thereof, the opposing affidavit of Mark R. McNamara sworn to November 11, 1999, the opposing affirmation of Kendra E. Winkelstein dated November 12, 1999, and due deliberation having been had thereon,

It is hereby ORDERED that the motion be, and the same hereby is, denied.

Entered: December 30, 1999 CARL M. DARNALL,
Clerk

**Order of the Appellate Division, Fourth Judicial Department, Entered October 1, 1999.**

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1124

PRESENT: GREEN, J.P., LAWTON, PIGOTT, JR., SCUDDER AND BALIO, JJ.

---

CA 99-174

JOSEPH M. ANDERSON,
*Plaintiff-Respondent,*

v.

NIAGARA MOHAWK POWER CORPORATION,
*Defendant-Appellant.*

---

Niagara Mohawk Power Corporation having appealed to this Court from certain parts of the order of the Supreme Court, entered in the Niagara County Clerk's Office on December 10, 1998, and said appeal having been argued by Mark R. McNamara of cousnel for defendant-appellant, Joseph E. Zdarsky of counsel for plaintiff-respondent, submitted by Harold M. Halpern of counsel for Tuscarora Nation of Indians, amicus curiae, and due deliberation having been had thereon,

It is hereby ORDERED that the order insofar as appealed from be and the same hereby is unanimously reversed on the law without costs, the motions are granted and the complaint is dismissed.

Memorandum that is hereby made a part hereof.

Entered: October 1, 1999 CARL M. DARNALL, Clerk

**Memorandum Decision of the Appellate Division, Fourth Judicial Department, Entered October 1, 1999.**

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

(1124) CA 99-174. (Niagara Co.)—JOSEPH M. ANDERSON, PLAINTIFF-RESPONDENT, V NIAGARA MOHAWK POWER CORPORATION, DEFENDANT-APPELLANT.—Order insofar as appealed from unanimously reversed on the law without costs, motions granted and complaint dismissed. Memorandum: Supreme Court should have granted the motion of defendant to renew its prior motion to dismiss the complaint for failure to join the Tuscarora Indian Nation as a necessary party to this action, and, upon renewal, should have granted the prior motion and dismissed the complaint (*see, Niagara Mohawk Power Corp. v. Anderson,* 258 AD2d____ [decided Feb. 10, 1999]; *Anderson v. Town of Lewiston,* 244 AD2d 965, *appeal dismissed* 91 NY2d 920). We therefore reverse the order insofar as appealed from, grant the motion to renew and, upon renewal, grant the prior motion and dismiss the complaint. In view of our determination, it is unnecessary to reach the remaining issues. (Appeal from Order of Supreme Court, Niagara County, Joslin, J.—Summary Judgment.) PRESENT: GREEN, J. P., LAWTON, PIGOTT, JR., SCUDDER AND BALIO, JJ. (Filed Oct. 1, 1999.)

**Order of Honorable Norman E. Joslin, J.S.C., Granted December 9, 1998.**

At an IAS Term of the Supreme Court of the State of New York, held in and for the County of Niagara, at the Courthouse thereof in Niagara Falls, New York on the 13th day of July, 1998.

PRESENT: Norman E. Joslin, J.S.C.
Justice Presiding

ORIGINAL FILED
DEC 10, 1998
WAYNE F. JAGOW
NIAGARA COUNTY CLERK
LOCKPORT, NEW YORK 14094

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

---

JOSEPH M. ANDERSON,

*Plaintiff,*

vs.

NIAGARA MOHAWK POWER CORPORATION,

*Defendant.*

---

Index No. 087329

---

ORDER

The defendant having made a motion for summary judgment and to renew its prior motion to dismiss for failure to join the Tuscarora Nation as a party, and the Tuscarora Nation having made a motion for leave to serve a brief and participate in oral argument, and said motions having regularly come on to be heard at an IAS

Term before the undersigned Justice of the Supreme Court, (and defendant having made a motion to settle the order,) (NEJ)

NOW, THEREFORE, upon reading and filing the plaintiff's notice of motion dated March 27, 1998, the supporting affirmation of Mark R. McNamara dated March 27, 1998 and the exhibits annexed thereto, the supporting affidavit of Gerald N. O'Neill sworn to March 24, 1998 and the exhibits annexed thereto, the reply affirmation of Mark R. McNamara dated July 8, 1998 and the exhibits annexed thereto, the affidavit of Paul Martin sworn to July 8, 1998 and the exhibits annexed thereto, and the reply affidavit of Gerald N. O'Neill sworn to July 7, 1998, and the exhibits annexed thereto, all in support of the defendant's motions; the notice of motion of the Tuscarora Nation for leave to appear as amicus curiae dated April 20, 1998 and the supporting affirmation of Harold M. Halpern, Esq. dated April 20, 1998; and the affidavit of Gerald T. Walsh, Esq., sworn to June 10, 1998 and the exhibits annexed thereto, the affidavit of Joseph M. Anderson, sworn to June 10, 1998, and the exhibits annexed thereto, all in opposition to the above motions, (and the papers on settlement of the order,) (NEJ) and the court having heard Hiscock & Barclay, LLP. (Mark R. McNamara, Esq., of counsel) in support of the plaintiff's motions; Borins, Halpern, Stromberg & Paskowitz (Harold M. Halpern, Esq., of counsel) in support of the Tuscarora Nation's Motion; and Zdarsky, Sawicki & Agostinelli (Joseph E. Zdarsky, Esq., of counsel) in opposition thereto, and due deliberation having been had thereon, it is hereby

ORDERED, that the defendants' motions for summary judgment and to renew defendant's motion to dismiss are hereby denied in all respects, and it is further

ORDERED, that the motion by the Tuscarora Nation for leave to serve a brief and participate in oral argument is hereby granted in all respects.

ENTER

s/ NORMAN E. JOSLIN
Norman E. Joslin, J.S.C.

GRANTED
December 9, 1998

**Letter Dated December 27, 1993,**
**Re: Electric Service Proposal.**

NM NIAGARA MOHAWK

NIAGARA MOHAWK POWER CORPORATION 1720 NEW ROAD,
NIAGARA FALLS, NEW YORK 14304 TELEPHONE (716) 236-2735

December 27, 1993

Mr. Joseph Anderson
2293 Saunders Settlement Road
Sanborn, NY 14132

Re: New Electric Service
2293 Saunders Settlement Road, Sanborn

Dear Mr. Anderson:

Enclosed for your review is our Electric Service Proposal for your new project at the above address.

Please review this proposal and contact me as soon as possible with any questions you may have. Due to the projected revenue, the normal customer charges that apply for this type of service are waived. If you approve the proposal as presented, please sign the enclosed copy of the letter and return it to my attention.

I look forward to working with you in order to successfully complete this project. If you require further information, please call me at 236-2751.

Very truly yours,
*NIAGARA MOHAWK POWER CORPORATION*

s/ PEGGY L. NOGARO/jld
Peggy L. Nogaro
Consumer Representative

PLN/jld
Enclosures
93:0955

cc: Mr. John Suita
CIR Electric

Approved: s/ JOSEPH ANDERSON
Joseph Anderson

| | |
|---|---|
| Name: | Smokin' Joes (Tuscarora Development Company) |
| Service Address: | 2293 Saunders Settlement Road, Sanborn, NY |
| Service Request: | 120/208 Volt, 3-phase, 4-Wire, 60 hertz, 1200 amp electric service with an estimated maximum demand of 400 KW. |
| Type of Service: | Underground primary service to padmounted transformer. |
| Short Circuit Current: | The customer receiving equipment should be capable of interrupting the calculated RMS symmetrical short circuit current of 77,100 amperes at 208 volts. |
| Enclosed Drawings & Specifications: | 1) Job Sketch dated December 10, 1993 2) "Supplement to Specifications for Electrical Installations"—Electric System Bulletin (ESB) #754 for Pad Mounted Transformers sketches 2, 3 & 5. |

| | |
|---|---|
| Customer's Responsibility: | *Transformer Pad:* Customer shall construct a suitable concrete pad for the 500 KVA transformer in accordance with ESB #754—figures 2, 3 & 5. Protective bumpers shall be provided, and installed by the customer as outlined on the job sketch. Prior to construction of the pad foundation, please notify Niagara Mohawk's Inspection Department at 236-2711. |
| | *Primary Conduit:* Customer to install approximately 240 feet of 2-5'' conduits from the transformer pad to Pole #2287 and include 2-5'' galv. steel, 42'' radius ells at the pad and at the pole and 1-5'' galv. steel 10' riser at the pole. |
| | *Secondary Conduit & Cable:* Customer to install service conduits and cable from pad mounted transformer to customer's receiving equipment. |
| Niagara Mohawk's Responsibility | NMPC will install approximately 280 circuit feet of 3 1/C #2 single conductor, lead covered 15 KV cable with a single conductor #2 concentric neutral from Pole #2287 to the pad mounted transformer. |

| | |
|---|---|
| Metering: | Before finalizing the service plan, please contact Niagara Mohawk's Meter Department at 236-2704 for review of meter location, secondary cable termination, and service entrance equipment. |
| Lead Time: | Niagara Mohawk will require a lead time of weeks for construction and delivery of materials. Upon receiving all the necessary permits for Niagara Mohawk Power Corporation, rights-of-way, and the enclosed acceptance letter, this project will be added to our construction schedule. |
| Customer Contribution: | Due to projected revenue, the normal customer charges that apply for this type of service installation are waived. However, they are subject to periodic review over a three-year period to verify that the waiver is justified. Niagara Mohawk reserves the right to bill the customer an adjusted contribution in accordance with our PSC Filed Rate Tariff if the amount of such waivers prove unwarranted. |
| PREPARED BY: | Peggy L. Nogaro,<br>Consumer Representative |
| PHONE: | (716) 236-2751 |
| DATE: | December 22, 1993 |

Approved: s/ JOSEPH ANDERSON
Joseph Anderson

## A12

**Letter Dated January 6, 1994, From Gerald N. O'Neill to Chief Leo Henry.**

NIAGARA MOHAWK POWER CORPORATION 1720 NEW ROAD,
NIAGARA FALLS, NEW YORK 14304 TELEPHONE (716) 236-2735

January 6, 1994

Chief Leo Henry
2006 Mt. Hope Road
Lewiston, NY 14092

Dear Chief Henry:

This is to notify you that, on the advice of our legal counsel, Niagara Mohawk is rescinding the verbal agreement we made with you and other members of the council of chiefs at our meeting on August 5, 1993.

As I told you at that time, the arrangement whereby you or your representative would tell us whom we could serve was highly irregular, and is contrary to Niagara Mohawk's charter to serve all customers in our franchise territory. Our Company attorneys feel strongly that we cannot accept this arrangement. The advice I have been given from them is that we should not serve any new customers until the federal court case with the Seneca Nation on the Tonawanda Reserve is settled, and we receive a ruling on the filing we made with the New York State Public Service Commission.

I took the position with the attorneys that I would prefer to return to the policy of serving all new applicants who meet the requirements for service. I told them that this is more in line with our franchise agreement. I also recall you saying during our August meeting that you do not want to get to the point where

we are not serving any new customers on Tuscarora lands. This could have a very detrimental affect on your people, since we have some new requests for service already pending, and you typically have several new services connected each year.

Please let me know your feelings on this. I will be happy to meet with you again, if that is your desire, or you may call me at 236-2738.

Sincerely,

*NIAGARA MOHAWK POWER CORPORATION*

s/ GERALD N. O'NEILL
Gerald N. O'Neill
District Manager

GNO/jld
94:0010

**Letter Dated January 17, 1994, From John W. Keib to Joseph E. Zdarsky.**

NM NIAGARA MOHAWK

NIAGARA MOHAWK POWER CORPORATION
300 ERIE BOULEVARD WEST, SYRACUSE, NEW YORK 13202
/TELEPHONE (315) 474-1511

JOHN W. KEIB
Assistant General Counsel

January 17, 1994

VIA TELEFAX (716-855-3101) AND REGULAR MAIL
Joseph E. Zdarsky, Esq.
Zdarsky, Sawicki & Agostinelli
404 Cathedral Place
298 Main St.
Buffalo, New York 14202

RE: Application of Joseph Anderson for power on the Tuscarora Reservation

Application of Stonehorse Lone Goeman, et al for power on the Tonawanda Reservation

Dear Mr. Zdarsky:

We have carefully considered the request that you and your clients (above referenced) have made for power. As you know, the issue of providing power over the objections of those who purport to speak for the Tribe is already a subject of litigation. As you also know, Niagara Mohawk has petitioned the Public Service Commission to give us direction in this regard.

We are prepared to provide power to your clients as long as the Public Service Commission advises us that it is appropriate to do so. We are making every effort to resolve this matter by seeking guidance from Federal District Court and the Public Service Commission. We seek your assistance in this regard, and urge you to make your position known to the Public Service Commission, so that electric service may be extended to your clients as soon as possible.

Very truly yours,

s/ JOHN W. KEIB
John W. Keib
Assistant General Counsel

JWK:dl
1/17/94 78443.1

**Decision of the New York State Public Service Commission, Dated April 19, 1995.**

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a Session of the Public Service Commission held in the City of Albany on April 19, 1995

COMMISSIONERS PRESENT:
Harold A. Jerry, Jr., Chairman
Lisa Rosenblum
William D. Cotter
Raymond J. O'Connor
John F. O'Mara

Case 93-E-0947— Petition of Niagara Mohawk Power Corporation For a Declaratory Ruling That an Indian Tribal Council's Consent Prerequisite Negates NMPC's Duty to Provide Service on Indian Reservations and, if NMPC's Franchises Are Invalid, NMPC's Obligation to Serve the Reservation Ceases, Absent a Waiver of Sovereign Immunity by the Nation.

DECLARATORY RULING
(Issued and Effective April 19, 1995)

BY THE COMMISSION:

## BACKGROUND

On November 4, 1993, Niagara Mohawk Power Corporation (NMPC) filed a petition requesting a declaratory ruling that the Commission find that NMPC had no obligation under the Public Service Law to provide service on Indian reservations. It also requested that the Commission find that if NMPC's franchises were invalid, then NMPC's obligation to serve the reservations ceased unless there was a waiver of tribal sovereign immunity. Finally, it requested that the Commission find that NMPC was not required to enter into a franchise with respect to an Indian reservation absent a waiver of sovereign immunity from the respective Indian Tribe or Nation.

A number of Indian nations have responded, asserting that the Commission lacks authority to rule on these matters under the doctrine of sovereign immunity. Some of them have requested oral argument.

Niagara Mohawk Power Corporation (NMPC) maintains and operates electric distribution facilities to all eight Indian reservations that are located within the boundaries of its service territory. NMPC has agreements with the Onondaga, St. Regis, Tonawanda and Tuscarora Indian Nations to construct, maintain and operate electric lines, poles, wires and cables as necessary for the operation of electric lines on and through each respective reservation for 99 years. These agreements were entered into by NMPC's predecessors-in-interest and are dated from 1926 to 1940.

The geneses of the petition are actions taken by several Indian Councils representing several Nations which NMPC contends preclude it from meeting its statutory obligations under the Public Service Law. NMPC alleges that they have become "unwillingly

involved in intra-Indian disputes on the Tuscarora, Tonawanda and Onondaga Indian reservation" (Pet. ¶8). Specifically, two Indian Tribal Councils, the Tuscarora Nation and the Tonawanda Band of Seneca Indians Nation, are requiring their consent before NMPC may provide services to an applicant. On the Onondaga reservation, power was disconnected to three business establishments because the owners had not paid tribal taxes. NMPC crews were advised by the Onondaga Sheriff's Department not to enter the reservation because of the potential for violence. NMPC was required to obtain the Council of Chiefs' consent before reconnecting services.

In the three franchise agreements, there is no provision for NMPC to obtain the prior consent of the respective Council prior to hooking up service for an applicant. NMPC argues that the imposition of a Tribal consent requirement "results in discriminating service practices and the granting of an unreasonable preference to one customer over another." (Pet. ¶14).[1] Therefore, NMPC requests that the Commission find that NMPC is not required to provide service on the reservation if a Council is first required to give its consent.

Further, NMPC states that the franchise agreements are now being challenged and if they are found to be invalid, their obligation to service the reservations will cease unless each Nation waives its sovereign immunity. NMPC alleges that certain chiefs have challenged the validity of the franchise agreements, claiming they lack appropriate federal approvals.

---

[1] Public Service Law §65(3) states, in part, that "No... electric corporation... shall make or grant any undue or unreasonable preference or advantage to any person, ...or subject any particular person... to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Responses were filed by the Seneca Nation of Indians', the Oneida Indian Nation of New York, the St. Regis Mohawk Tribe, the Onondaga Nation Response, and a joint response by the Tonawanda Band of Seneca Indians and the Tuscarora Nation of Indians. Each Nation argued that the Commission should not grant NMPC's petition because it lacks jurisdiction over Indian Tribes. They argued that Indian Nations are sovereign nations and, therefore, are not subject to the jurisdiction of state courts. The Nations also asserted that the sovereignty of Indian Nations has long been recognized and that each Nation is entitled to immunity. Any waiver of sovereign immunity must be unequivocally expressed, which has not occurred here.

A response was also filed by the Applicants for Service: Stonehorse Lone Goeman, Rex Doctor, John Redeye, Peter Poodry, David Peters, (Residents of the Tonawanda Indian reservation); Joseph M. Anderson, Morley Clause (Residents of the Tuscarora Indian reservation); and Kenneth Papineau, Veronica Papineau, Oliver R. Hill (Residents of the Onondaga Indian reservation). These individuals maintain residences and/or businesses on reservations and state they have been either denied electric service or threatened with denial of service to their homes and/or businesses.

The Applicants for Service urge that the denial of power is a "substantial interference with [their], safety and welfare. . ." They state that NMPC has allowed itself to be used for political purposes by the few tribal chiefs who claim that they have the right to disrupt electrical service. They have submitted sworn statements from chiefs who state that the chiefs who were seeking to control electricity were acting in their individual capacity and not in their official capacity. The Applicants for Service argue that NMPC, as a public utility, should

comply with its statutory, responsibilities and furnish. . .service to all persons who are otherwise qualified. Further, since electric service has been furnished to the reservations for decades, tribal consent to the agreements is both express and implied as a result of the course of dealing over the years.

In NMPC's Memorandum of Law in Opposition to the Motions to Dismiss, NMPC states that the Commission clearly has jurisdiction over the actions of NMPC. In addition, NMPC argues, the requested declaratory rulings should be issued because the relief requested is necessary to prevent discriminatory service.

## DISCUSSION

The threshold issue is whether the Public Service Law applies to Indian reservations, thereby empowering the Commission with the authority to regulate directly the manner in which NMPC provides service on the reservation. Indian Nations have historically been subject to federal control. This long-standing history emanates partially from the United States Constitution Article 1, §8, cl. 3, which gives Congress plenary authority over Indian affairs. The Constitution states, in pertinent part, that Congress has the authority "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."

Because Indian Nations are subject to federal control, state laws are generally not applicable, absent Congressional consent. Because there is no applicable federal grant of authority, the Commission may not directly regulate the provision of electricity on Indian reservations.

The franschise agreements do not grant the Commission jurisdiction over the Indian reservations, but the Tonawanda and Tuscarora franchises do provide that NMPC will serve any applicant desiring service within the reservation upon the terms and provisions, rules and regulations of the company's schedules filed with the Commission. Thus, when and if the franchise agreements of the Tuscarora Nation of Indians and the Tonawanda Nation of Seneca Indians are approved by the federal government, the company's tariffs will require it to serve those reservations on a non-discriminatory basis The commission will not have jurisdiction over the Indian reservations, but it will have jurisdiction to interpret NMPC's tariffs and to require the company to comply with them.

## CONCLUSION

Accordingly, the Commission finds and declares that it lacks jurisdiction over Indian reservations, but upon federal approval of existing signed franchise agreements, NMPC will be obligated to provide non-discriminatory service on the Tuscarora and Tonawanda reservations.

By the Commission,

(SIGNED) JOHN J. KELLIHER
Secretary

FILED
AUG 14
OFFICE OF THE CLERK

(2)

No. 00-73

IN THE

# Supreme Court of the United States

JOSEPH M. ANDERSON,

*Petitioner,*

*v.*

NIAGARA MOHAWK POWER CORPORATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FOURTH JUDICIAL DEPARTMENT

## BRIEF IN OPPOSITION

MARK R. MCNAMARA
*Counsel of Record*
SAMUEL J. BURRUANO, JR.
HISCOCK & BARCLAY, LLP
*Attorneys for Respondent*
*Niagara Mohawk Power Corporation*
50 Fountain Plaza, Suite 301
Buffalo, New York 14202-2291
(716) 856-0911

161531

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

-1/4/00

## QUESTIONS PRESENTED

1. Whether 25 U.S.C. § 233 constitutes Congressional abrogation of the sovereign immunity from suit enjoyed by the Tuscarora Nation of Indians.

2. Whether 25 U.S.C. § 233 compels the assertion of jurisdiction over proceedings involving Native Americans irrespective of whether the rights of an Indian Nation would be adversely impaired.

3. Whether federal and state procedural rules that prevent the adjudication of controversies absent the joinder of an indispensable party violate the United States Constitution.

4. Whether the United States Supreme Court should exercise its discretionary jurisdiction to rule on the application of a state procedural rule.

## LIST OF AFFECTED PARTIES AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

**A. Joseph M. Anderson.**

Petitioner Joseph M. Anderson ("Petitioner" or "Anderson") asserts that he is a member of the Tuscarora Nation of Indians and owns and operates a variety of retail, wholesale, and manufacturing businesses on the Tuscarora Indian Reservation. (Record on Appeal, hereinafter "R." 42).

Petitioner claims that respondent Niagara Mohawk Power Corporation violated a franchise agreement between the company and the Tuscarora Nation of Indians by failing to provide Petitioner with electric service in a non-discriminatory manner, breached an alleged agreement with Petitioner to provide electric service on the Tuscarora Indian Reservation, and violated a New York State statute. (R. 10-11, 41-49).

**B. Niagara Mohawk Power Corporation.**

Respondent Niagara Mohawk Power Corporation ("Respondent" or "Niagara Mohawk") is an electric and gas corporation organized under the New York Transportations Corporation Law, and is engaged in the generation, transmission, and distribution of electric utility service in New York State. (R. 14, 42).

Niagara Mohawk is a subsidiary of Niagara Mohawk Holdings, Inc. Niagara Mohawk Holdings, Inc. has two subsidiaries: Opinac North America, Inc. and Niagara Mohawk. Opinac North America, Inc. has two subsidiaries of its own: Niagara Mohawk Energy, Inc. (formerly Plum

Street Enterprises) and Opinac Energy Corporation. Opinac Energy Corporation owns fifty percent (50%) of Canadian Niagara Power Company, Ltd. Niagara Mohawk has six subsidiaries of its own: NM Properties, Inc.; NM Receivables Corp. II; NM Receivables, LLC; NM Uranium, Inc.; Beebee Island Corporation; and Moreau Manufacturing Corporation.

**C. The Tuscarora Nation of Indians.**

The Tuscarora Nation of Indians (the "Tuscarora Nation") is a federally recognized Indian tribe with a Reservation in the State of New York. The Tuscarora Nation is one of six Indian Nations in upstate New York. The six Indian Nations are known collectively as the Haudenosaunee or the "People of the Longhouse." Their confederacy was established around the year 1000 A.D. under the Kaianerekow, that is, the "Great Law of Peace." (R. 69). Under the Great Law of Peace, each nation of the confederacy governs its own territory through a council of chiefs designated by clan mothers. (R. 69).

The Tuscarora Nation continues to maintain its traditional form of government, derived from the Great Law of Peace. The United States Department of Interior, Bureau of Indian Affairs ("BIA") recognizes the Council of Chiefs as the legal governing body of the Tuscarora Nation and Tuscarora Chief Leo R. Henry (Clerk for the Tuscarora Council of Chiefs) as the official spokesperson for the Tuscarora Nation. (R. 147-155). All governmental functions, whether legislative, executive or judicial are concentrated in the Council of Chiefs. The Tuscarora Nation has asserted its right as a sovereign to control utility usage on the Tuscarora Indian Reservation (R. 33-34, 36-37, 39, 40, 533) and has asserted that it is an indispensable party to this

proceeding. (R. 532-550). Petitioner and Niagara Mohawk have both consented to the Tuscarora Nation's submission of an *amicus curiae* brief in opposition to the Petition for Certiorari.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| List of Affected Parties and Rule 29.6 Corporate Disclosure Statement | ii |
| Table of Contents | v |
| Table of Cited Authorities | vii |
| Table of Appendices | xi |
| Statement of Jurisdiction | 1 |
| Concise Statement of Case | 1 |
| A. Background. | 1 |
| B. Lower Court Proceedings. | 3 |
| C. The Tuscarora Nation's Directive that Applicants for Electric Service Must Obtain the Nation's Prior Consent. | 4 |
| D. Result of Proceedings Before the Public Service Commission and the Bureau of Indian Affairs. | 7 |

*Contents*


| | *Page* |
|---|---|
| Reasons for Denying the Writ ..... | 8 |
| I. The Fourth Department Applied Well-Settled Principles of Federal and State Law when it Dismissed Petitioner's Complaint for Failure to Join the Tuscarora Nation as an Indispensable Party to this Proceeding. ..... | 10 |
| II. The Dismissal Order of Petitioner's Complaint does not Conflict with 25 U.S.C. § 233. ..... | 16 |
| III. The Fourth Department's Order does not Conflict with Federal Circuit Courts of Appeals Decisions. The Fourth Department Decision Follows Well-Settled Principles of Federal and State Law. ..... | 21 |
| IV. The Relief Petitioner Seeks Would Overturn Federal and State Procedural Rules Which Prohibit the Adjudication of a Controversy Absent the Joinder of an Indispensable Party. ..... | 25 |
| Conclusion ..... | 26 |

## TABLE OF CITED AUTHORITIES

*Page*

**Federal Cases:**

*Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir. 2000) ..... 22, 23, 24

*Boddie v. Connecticut*, 401 U.S. 371 (1971) ..... 19, 20

*Bowen v. Doyle*, 880 F. Supp. 99 (W.D.N.Y. 1995) ..... 17

*Claflin v. Houseman*, 93 U.S. 130 (1876) ..... 18

*Davis v. United States*, 192 F.3d 951 (10th Cir. 1999) ..... 22, 25

*Enterprise Management Consultants, Inc. v. U.S. ex rel Hodel*, 883 F.2d 890 (10th Cir. 1989) .... 11

*Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542 (2d Cir. 1991), *cert. denied*, 502 U.S. 818 (1991) ..... *passim*

*Griffin v. Illinois*, 351 U.S. 12 (1956) ..... 18, 19

*Howlett By and Through Howlett v. Rose*, 496 U.S. 356 (1990) ..... 18

*McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989) ..... 10

*Cited Authorities*

*Page*

*Mondue v. New York N.H.&H.R. Co.*, 223 U.S. 1 (1912) ..... 18

*New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) ..... 13

*Niagara Mohawk Power Corporation v. Anderson*, 258 A.D.2d 958, 685 N.Y.S.2d 502 (4th Dept.), *appeal dismissed*, 93 N.Y.2d 958 (1999) ..... *passim*

*Oklahoma Tax Commission v. Potowatomi*, 498 U.S. 505 (1991) ..... 10

*Pembina Treaty Committee v. Lujan*, 980 F.2d 542 (8th Cir. 1992) ..... 11

*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) ..... 10, 18

*Testa v. Katt*, 330 U.S. 386 (1947) ..... 18

*Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999) ..... 20, 21, 22

*Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986) ..... 11, 12

*Cited Authorities*

*Page*

**New York State Cases:**

*Anderson v. Town of Lewiston*, 244 A.D.2d 965, 665 N.Y.S.2d 164 (4th Dept. 1997), *appeal dismissed*, 91 N.Y.2d 920 (1998) ..... *passim*

*City of New York v. Long Is. Airports Limousine Serv. Corp.*, 48 N.Y.2d 469 (1979) ..... 25

**Federal Statutory Provisions and Procedural Rules:**

25 U.S.C. § 233 ..... *passim*

25 U.S.C. § 476 ..... 20

Fed. R. Civ. 19 ..... *passim*

United States Supreme Court Rule 10 ..... 1

**New York State Statutes and Procedural Rules:**

New York Civil Practice Law and Rule 1001 .... *passim*

New York Civil Practice Law and Rule 1002 .... *passim*

New York Civil Practice Law and Rule 1003 .... *passim*

New York State Public Service Law § 65 ..... 5

*Cited Authorities*

*Page*

**United States Constitution:**

Article VI, Cl. 2 ..... 16

Fifth Amendment ..... 16

Fourteenth Amendment ..... 16

**Other Authorities:**

Felix S. Cohen, *Handbook of Federal Indian Law*, Ch. 4, Sec. C5 (1982 ed.) ..... 13

Agnes Palazzetti, *Chiefs Launch Effort to Close Bingo Hall*, The Buffalo News, March 18, 1994 ..... 15, 16

Agnes Palazzetti, *Indian-made Gasahol, Cigarettes at Issue*, The Buffalo News, May 1, 1997 ..... 15

Agnes Palazzetti, *Rebels Launch Campaign to Remove Tribal Chiefs, Want Federal Bureau of Indian Affairs to recognize new Governing Bodies*, The Buffalo News (March 27, 1994) ..... 16

Robert B. Porter, *Building a New Longhouse: The Case for Government Reform Within the Six Nations of the Haudenosaunee*, 46 Buff. L. Rev. 805 (Fall 1998) ..... 15

Professor David Sonenschein, Commentary to Fed. R. Civ. P. 19 ..... 10

## TABLE OF APPENDICES

*Page*

Appendix A — Letter From Tuscarora Chief Leo R. Henry To Gerald O'Neill Dated August 26, 1993 ..... 1a

Appendix B — Letter From Kimberly Schechter To Gerald O'Neill Dated September 3, 1993 ..... 3a

Appendix C — Excerpt From September 1993 Edition Of The Tuscarora Health Center Newsletter ..... 5a

## STATEMENT OF JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that this Court may grant a petition for certiorari only for compelling reasons. According to Rule 10, compelling reasons can be found, among other things, if the decision leading to the petition: contributes to a conflict of authority between the Courts of Appeal and/or state courts of last resort, reflects a departure from the usual course of judicial proceedings, or presents an important question of federal law that has not but should be settled by this Court. For the reasons explained below, Petitioner has not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction.

## CONCISE STATEMENT OF CASE

Petitioner's Statement of the Case includes a various misstatements of fact. Respondent offers the following as a correct account of the facts in this case.

### A. Background.

For over fifty years Niagara Mohawk provided electric service to qualified applicants of the Tuscarora Indian Reservation pursuant to a 1937 franchise agreement between the Tuscarora Nation and Niagara Mohawk's predecessor in interest (the "Tuscarora Franchise Agreement") (R. 50-52) which granted Niagara Mohawk the franchise to construct, maintain, and operate electrical lines on the Tuscarora Indian Reservation. (R. 13, 33, 50). In August 1993, the Tuscarora Nation asserted its right as a sovereign nation to control utility usage across its borders and on its tribal lands by requiring applicants for new or upgraded electric service to obtain the Tuscarora Nation's prior consent. (R. 33-34, 36-37, 39, 533, 572).

The instant case arises out of efforts by Petitioner, a Tuscarora Native American, to evade the tribal directive that

applicants for electric service on the Tuscarora Indian Reservation must obtain the prior consent of the Tuscarora Nation. Although Petitioner was aware of the tribal directive at the time in which he applied for electric service that forms the basis of the instant proceeding (R. 18-19, 129, 163-164, 211-212), Petitioner chose to disregard the tribal directive. Petitioner took the position that he is not bound by the tribal directive contending that the directive was not an effective or valid action by the Tuscarora Nation (R. 121-128, 167, 211-212, 288) (Petition for Writ of Certiorari, hereinafter "Petition for Certiorari" at 6-7).

On August 17, 1994, Petitioner sued Niagara Mohawk contending that Niagara Mohawk:

> 1.) breached an alleged contract with Petitioner to provide electric service to an approximate six-acre parcel of then undeveloped land located on the Tuscarora Indian Reservation which Petitioner claimed he planned to commercially develop,
>
> 2.) violated the Tuscarora Franchise Agreement (R. 50-52) by failing to provide electric service in a non-discriminatory manner, and
>
> 3.) violated Section 65 of the New York State Public Service Law ("PSL") which provides, in pertinent part, that no electric corporation will subject any person to any undue or unreasonable prejudice or disadvantage.

(R. 10-11, 41-49). Niagara Mohawk has denied all of Petitioner's claims including the existence of a contractual relationship. (R. 233-239).

Subsequent to the commencement of Petitioner's suit, the New York State Public Service Commission ("PSC") determined on April 19, 1995 that the PSL was invalid as applied to the

Tuscarora Reservation (R. 64-65). In January 1996, the Tuscarora Franchise Agreement was declared void *ab initio* by the BIA (R. 66-67, 642, 646, 653-654). In addition, the New York State Appellate Division, Fourth Judicial Department ("Fourth Department"), on two separate occasions, unanimously affirmed dismissal of similar claims asserted by Tuscarora Nation members (including Petitioner) for failure to join the Tuscarora Nation. *Anderson v. Town of Lewiston*, 244 A.D.2d 965, 665 N.Y.S.2d 164 (4th Dept. 1997), *appeal dismissed,* 91 N.Y.2d 920 (1998); *Niagara Mohawk Power Corporation v. Anderson*, 258 A.D.2d 958, 685 N.Y.S.2d 502 (4th Dept.), *appeal dismissed*, 93 N.Y.2d 958 (1999).

**B. Lower Court Proceedings.**

On March 27, 1998, Niagara Mohawk moved for summary judgment dismissing Petitioner's complaint on various grounds for which there are no material issues of fact in dispute, and moved to reconsider whether this action should be dismissed, pursuant to New York Civil Practice Law and Rules ("CPLR") 1001-1003, for failure to join an indispensable party — the Tuscarora Nation. (R. 7-249). Subsequent to the submission of Niagara Mohawk's motion, the Tuscarora Nation applied for leave to file an *amicus curiae* brief and to participate at oral argument on Niagara Mohawk's motions. (R. 252-254). In its *amicus curiae* brief, the Tuscarora Nation asserted that it would be clearly prejudiced if this matter were to proceed in its absence. (R. 532-550).

The lower court denied Niagara Mohawk's motion for summary judgment and motion to renew, and granted the Tuscarora Nation's motion to file an *amicus* brief. (R. 587). On appeal, the Fourth Department granted the Tuscarora Nation's motion to file a brief *amicus curiae* in support of Niagara Mohawk's appeal and denied Petitioner's cross-motion to dismiss the appeal. In addition, on October 1, 1999, the Fourth Department unanimously reversed the lower court's order and

issued an order dismissing Petitioner's complaint. The Fourth Department's memorandum decision is reported at 265 A.D.2d 817, 696 N.Y.S.2d 736 (4th Dept. 1999). On November 5, 1999, Petitioner served a motion to reargue, or in the alternative, motion for leave to appeal to the New York State Court of Appeals. On December 30, 1999, the Fourth Department denied Petitioner's motion to reargue and motion for leave to appeal to the New York State Court of Appeals. (Petition for Certiorari, Appendix A2). On April 13, 2000, the New York State Court of Appeals denied Petitioner's motion for leave to appeal and awarded Respondent one hundred dollars costs plus necessary reproduction disbursements (Petition for Certiorari, Appendix A1). The New York State Court of Appeals decision is reported at 94 N.Y.2d 764 (2000).

### C. The Tuscarora Nation's Directive that Applicants for Electric Service Must Obtain the Nation's Prior Consent.

In August 1993, the Tuscarora Nation asserted its right as a sovereign to control utility usage within the borders of the Tuscarora Indian Reservation by directing that applicants for new or upgraded electric service must obtain the Nation's prior approval or consent. (R. 33-34, 36-37, 39, 533, 572). On behalf of the Nation, Tuscarora Chief Leo Henry advised Niagara Mohawk that the Nation's prior consent to all applications for electric service on the Reservation was necessary to prevent non-enrolled Tuscaroras from residing on the Tuscarora Indian Reservation. (R. 33-34).

The Nation's direction that no electrical service be made within the boundaries of the Tuscarora Indian Reservation without the prior consent of the Tuscarora Nation was stated by Chief Henry in an August 26, 1993 letter to Niagara Mohawk (R. 39) (Reproduced at Appendix A at 1a), and in a September 3, 1993 letter from the Nation's attorneys, the law firm of Borins, Halpern & Stromberg. (R. 40) (Reproduced at Appendix B

at 3a). The September 3, 1993 letter from the Nation's attorneys stated that the Tuscarora Council of Chiefs was concerned that electric service be provided without council approval to a building being erected by Petitioner on Indian Hill Road on the Reservation. *(Id.)* Notice of the tribal consent directive was published in the September 1993 edition of the Tuscarora Health Center Newsletter (R. 162), a copy of which was telefaxed by Petitioner's attorneys to Niagara Mohawk's attorneys on October 18, 1993. (R. 163-164). (A copy of the notice is produced at Appendix C at 5a).

In a letter dated October 22, 1993, Tuscarora Chief Webster Cusick, with Petitioner's collaboration, challenged the Council's action stating that the requirement of tribal consent for the provision of electric service on the Reservation was not the "official action of the Tuscarora Nation" alleging that there have been no Council meetings since 1987. (R. 121-128, 167). Petitioner's contention that the Tuscarora Nation did not require individuals located within its sovereign borders to obtain the Nation's prior consent has already been rejected by the state courts. (*See Niagara Mohawk Power Corporation v. Anderson*, 685 N.Y.S.2d at 503 ("[i]n 1993 the [Tuscarora] Nation determined [Niagara Mohawk] could provide new updated electrical service only with the permission of the Indian Nation".) (*See also* R. 62).

In November 1993, Niagara Mohawk filed a petition with the PSC to determine, in relevant part, whether the Tuscarora Nation could use its authority as a sovereign to control to whom Niagara Mohawk rendered electric service on the Reservation and thereby transcend various state laws and regulations which prohibit discriminatory utility service practices (e.g., PSL § 65) and whether Niagara Mohawk has an obligation to serve applicants on the Tuscarora Indian Reservation if the Tuscarora Franchise Agreement is determined to be invalid, unenforceable, or subject to control by the Tuscarora Nation (the "PSC Proceeding") (R. 19-20, 170-171).

At or about the same time Petitioner was in the process of making an application to Niagara Mohawk for electrical service which formed the basis of the instant proceeding, the law firm of Zdarsky, Sawicki, & Agostinelli appeared on behalf of Petitioner in the PSC Proceeding. (R. 20, 207). Petitioner was fully cognizant of the position taken by certain Tuscarora Chiefs that the Tuscarora Nation's prior consent was required before new electric service could be provided to applicants, like Petitioner, on the Tuscarora Indian Reservation when Petitioner made his electric service application as evidenced through his December 11, 1993 submission to the PSC. (R. 208-214).

In late December 1993, Niagara Mohawk sent Petitioner an "Electric Service Proposal" dated December 27, 1993 ("ESP") relating to Petitioner's request for new electric power which is the basis for Petitioner's breach of contract claim. (R. 242-243, 257-258). The ESP specifically states that it is conditioned upon the procurement of ". . . all the necessary permits . . . [and] rights of way . . ." (R. 244) (Petition for Certiorari, Appendix A11).

The Tuscarora Nation has consistently maintained since August 1993 (and during the time of Petitioner's electric application) that any new or upgraded electric service provided to applicants on the Reservation requires the prior approval of the Council of Chiefs. (R. 33-34, 36-37, 39-40, 533-535). The Tuscarora Nation's directive was made for various reasons including, but not limited to, preventing non-enrolled Tuscaroras from residing on tribal land and to allow the Tuscarora Nation to enforce its land use and economic development regulations. (R. 33-34, 533). Petitioner did not obtain the consent of the Tuscarora Nation for the provision of new electric service at issue in the instant proceeding (R. 572). Because Petitioner did not satisfy this tribal requirement (*id.*), Petitioner failed to comply with all controlling laws for the provision of power to the Tuscarora Indian Reservation and his business was not energized with new electric service.

In January 1994, Niagara Mohawk advised the Tuscarora Nation that it would not provide electric service to any new applicants on the Reservation pending the adjudication of the company's rights and obligations under the PSL. Niagara Mohawk continued to provide new electric service to applicants with special medical needs and to New York State run facilities upon notice to the Council of Chiefs. (R. 481-482)

**D. Result of Proceedings Before the Public Service Commission and the Bureau of Indian Affairs.**

On April 19, 1995, the PSC determined that it lacks jurisdiction over Indian reservations, ". . . but upon federal approval of existing signed franchise agreements, Niagara Mohawk will be obligated to provide non-discriminatory service on the Tuscarora and Tonawanda Reservations." (R. 65). The PSC also determined that the PSL was invalid as applied to the Tuscarora Reservation. (R. 64-65). Pursuant to the PSC Decision, Niagara Mohawk submitted the Tuscarora Franchise Agreement to the BIA for its review. (R. 22).

In late January 1996, the BIA determined that the Tuscarora Franchise Agreement was not authorized by Congress and hence was *void ab initio* because it was not approved by the Federal Government as required by Federal "Non-Intercourse" statutory provisions. (R. 66-67). In a decision issued on July 23, 1998, the United States Department of Interior, Interior Board of Indian Appeals ("IBIA") affirmed the BIA's January 29, 1996 decision. (R. 642-645).

Relying upon its prior, recent, and unanimous decisions in *Anderson v. Town of Lewiston*, 665 N.Y.S.2d at 165, and *Niagara Mohawk Power Corporation v. Anderson*, 685 N.Y.S.2d at 503, and applying the state joinder rules found at CPLR 1001-1003, the Fourth Department determined that the trial level supreme court erred in denying Niagara Mohawk's motion to dismiss for failure to join the Tuscarora Nation. As such, the Fourth

Department did not rule on Niagara Mohawk's appeal of the trial level supreme court's denial of its motion for summary judgment.

## REASONS FOR DENYING THE WRIT

The instant case arises out of efforts by Petitioner, a disgruntled Tuscarora Native American who has a long-standing feud with the Tuscarora Nation, to evade the tribal directive of the Tuscarora Nation that applicants for electric service on the Tuscarora Indian Reservation must obtain the prior consent of the Nation for a new or upgraded electric service. (R. 33-34, 36-40, 533-535). Petitioner's contention that "[n]o interest was cited by the Tuscarora Nation that would in any way prevent the parties from adjudicating Anderson's claim for monetary damages" and that ". . . there is absolutely nothing in the record to indicate that the Tuscarora Nation ever opposed Anderson's request for expanded service" (Petition for Certiorari at 5) is untrue and a complete distortion of the record below. The Tuscarora Nation submitted an *amicus curiae* brief to the trial level supreme court, the Fourth Department, and the New York State Court of Appeals in which the Nation explicitly stated that it would be adversely affected should this case proceed in its absence (R. 535-542). In addition, Niagara Mohawk submitted proof that the Tuscarora Nation was opposed to the provision of new electric service to Petitioner and that Petitioner never obtained the prior consent of the Tuscarora Nation as required by tribal law. (R. 18-19, 27, 33-34, 39-40, 162-164, 572-573). Obviously, the Tuscarora Nation would not have submitted *amicus curiae* briefs to the courts below, as well as this Court, seeking to dismiss Petitioner's complaint had the Tuscarora Nation approved that new electric service be provided to a business that Petitioner operates on the Tuscarora Indian Reservation.

There is no conflict in authority between the Courts of Appeal and/or the New York State Court of Appeals nor an

important question of federal law that has not, but should be, settled by this Court. On the contrary, the courts below correctly applied well-established state procedural rules as well as federal and state case law that precludes the litigation of matters in which the rights of an Indian Nation would be adversely impaired or prejudiced. Petitioner's contention that the Fourth Department failed to consider the factors contained in CPLR § 1001 (Petition for Certiorari at 11) is unfounded. The instant proceeding is the third occasion on which the Fourth Department applied the state joinder rules contained in Article 10 of the CPLR and unanimously dismissed virtually identical claims asserted by a Tuscarora Native American (including Petitioner) for failure to join the Tuscarora Nation. *See Niagara Mohawk v. Anderson*, 685 N.Y.S.2d at 503 and *Anderson v. Town of Lewiston*, 665 N.Y.S.2d at 165. Moreover, Petitioner has failed to demonstrate that federal decisional law interpreting the federal joinder rule found at Fed. R. Civ. P. 19 controls a state court's application of its own joinder rule.

Petitioner's argument that the Fourth Department's dismissal order violates 25 U.S.C. § 233 and deprives Petitioner of his constitutional rights both ignores the explicit language contained in 25 U.S.C. § 233 that limits the jurisdiction of the State of New York and distorts well-established federal and state legal principles concerning the sovereign immunity of Indian Nations and the mandatory dismissal of cases where an Indian Nation is an indispensable party. Finally, the relief Petitioner seeks would effectively overturn Fed. R. Civ. 19 and state procedural rules which prohibit the adjudication of a controversy absent the joinder of all indispensable parties, and overturn well-settled case law that precludes the adjudication of claims in which the rights or interests of sovereign nations would be adversely affected. 25 U.S.C. § 233 was never intended to, and does not, cause such a result.

## I. The Fourth Department Applied Well-Settled Principles of Federal and State Law when it Dismissed Petitioner's Complaint for Failure to Join the Tuscarora Nation as an Indispensable Party to this Proceeding.

The law pertaining to an Indian Nation's sovereign immunity from suit is well-settled. In *Oklahoma Tax Commission v. Potowatomi*, 498 U.S. 505, 509 (1991), the United States Supreme Court recognized that Indian Tribes were "domestic dependent nations" that exercise inherent sovereign authority over their members and territories, and that they are immune from suit in state courts "absent a clear waiver by the tribe or congressional abrogation." *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 545 (2d Cir. 1991), *cert. denied*, 502 U.S. 818 (1991).

The law pertaining to the joinder of parties is equally well-settled. Federal and New York State procedural rules (Fed. R. Civ. P. 19 and CPLR 1001-1003, respectively) and governing case law prohibit the adjudication of a controversy absent the presence of all indispensable parties[1]. *See e.g.*, *McClendon v. United States*, 885 F.2d 627, 633 (9th Cir. 1989) (Indian tribe is an indispensable party under Fed. R. Civ. P. 19 in an action seeking to enforce a contract

---

1. In the Commentary to Fed. R. Civ. P. 19, Professor David Sonenschein notes:

> Rule 19 is the modern version of the former "Necessary and Indispensable Party" rule. Rule 19 provides for compulsory joinder of persons or entities whose absence from lawsuit [sic.] would cause injustice in various listed ways . . . Rule 19(b) . . . provides that where an absent party is one who should be joined under Rule 19(a), but whose joinder is impossible, and where the lawsuit cannot proceed "in equity and good conscience" in its absence, the case must be dismissed. A party in whose absence the case cannot proceed is denominated "indispensable."

signed by the tribe); *Pembina Treaty Committee v. Lujan*, 980 F.2d 542, 545 (8th Cir. 1992) (Indian Nation is an indispensable party to a proceeding which would ". . . imperil the tribe's right to self-governance"); *Enterprise Management Consultants, Inc. v. U.S. ex rel Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (court dismissed action finding that suit against Indian Nation was barred by sovereign immunity and determined, *sua sponte*, that remaining action could not proceed holding that the Indian Nation was an indispensable party); *Niagara Mohawk Power Corporation*, 696 N.Y.S.2d at 503 (Tuscarora Nation is an indispensable party to a proceeding involving electric usage on the Tuscarora Indian Reservation); *Anderson*, 665 N.Y.S.2d at 164 (Tuscarora Nation is an indispensable party to a proceeding involving water usage on the Tuscarora Indian Reservation).

The mandatory dismissal for the non-joinder of a party commonly occurs where the rights of an Indian Nation may be adversely impaired. In *Fluent v. Salamanca Indian Lease Auth.*, the Second Circuit stressed that one factor which is of "paramount importance" in indispensable party analysis under Fed. R. Civ. P. 19 is the doctrine of sovereign immunity. In determining whether to allow plaintiffs' action to proceed without the presence of the Seneca Nation of Indians, the Second Circuit in *Fluent* noted:

> [i]t has been held that when an indispensable party is "immune from suit, 'there is very little room for balancing of other factors' set out in [R]ule 19(b), because immunity 'may be viewed as one of those interests 'compelling by themselves'."

*Fluent*, 928 F.2d at 548, *quoting Enterprise Management Consultants*, 883 F.2d at 890. The *Fluent* court stressed that ". . . dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent". *Fluent*, 928 F.2d at 548, *quoting Wichita &*

*Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 777, n.13 (D.C. Cir. 1986).

Applying state joinder rules, the Fourth Department correctly dismissed Petitioner's complaint finding that the Tuscarora Nation is an indispensable party to the adjudication of Petitioner's claims. *Anderson*, 696 N.Y.S.2d at 737. The Fourth Department correctly reasoned that the Tuscarora Nation is an indispensable party because the issues presented directly and fundamentally affect the Tuscarora Nation. Resolution of Petitioner's claims which assert that Niagara Mohawk is obligated to serve a business that Petitioner operates on the Tuscarora Indian Reservation would directly contravene the Tuscarora Nation's directive that applicants for electric service obtain the Tuscarora Nation's prior consent as a prerequisite to the receipt of new or upgraded electric service.

Petitioner's contention that the Tuscarora Nation cannot be inequitably affected by a money judgment against Niagara Mohawk (Petition for Certiorari at 13) is fatally flawed. The fact that Petitioner does not seek any relief from the Tuscarora Nation is immaterial because the Nation will be prejudiced if a finding of liability results in this case. The Tuscarora Nation has a vital interest in this case because a core element of its sovereignty as an Indian Nation is to regulate access to and the provision of electric or other services on its territory. At the heart of Petitioner's claims against Niagara Mohawk is a challenge to the Tuscarora Nation's power to control and regulate its borders and territory. The Tuscarora Nation would be directly and inequitably affected by any adjudication of Petitioner's claims in its absence because such adjudication assumes the power and jurisdiction of the court to supersede the Nation's sovereign authority over its own borders and territory. If the Tuscarora Nation's directives as to access to its own territory can be overridden by a court, the Nation's sovereignty is, by definition, violated. That is the essence of this dispute.

It is well-settled that there is nothing more fundamental to sovereignty than the right of an Indian nation to control access to its territory and borders and to regulate its internal affairs. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983). *See also* Felix S. Cohen, *Handbook of Federal Indian Law*, Ch. 4, Sec. C5 at 252 (1982 ed.).

Petitioner's contention that no evidence was presented to demonstrate a legitimate interest on the part of the Tuscarora Nation and that "there is no evidence in the record to show any indication that the Nation did not consent to Anderson's contract for expanded service at his Route 31 location [on the Tuscarora Indian Reservation]" (Petition for Certiorari at 13) distorts the Record below. Niagara Mohawk submitted conclusive and uncontroverted evidence that the Tuscarora Nation asserted its right as a sovereign to control its borders and prevent Niagara Mohawk from providing electric service to applicants located on the Tuscarora Indian Reservation without the Nation's prior approval or consent (R. 18-19, 27, 33-34, 39-40, 162-164), that the Nation was specifically opposed to the provision of electric service to another business Petitioner operates on the Tuscarora Indian Reservation (R. 40), and that the Nation did not consent to the provision of new electric service to the property that Petitioner planned to commercially develop that is at issue in this proceeding (R. 572-573). Notably, the Electric Planner assigned to Petitioner's application for electric service testified:

> 5. . . . Since [Petitioner] was requesting new electric service to a location on the Tuscarora Reservation, I understood that [Petitioner] needed to obtain the prior consent of the Tuscarora Nation before Niagara Mohawk could make the necessary electrical connections and energize the location . . .
>
> 8. My records do not indicate that [Petitioner] ever received the prior consent of the Tuscarora Nation in connection with his request for new electric service that forms the basis of this lawsuit.

> 9. It is the ultimate responsibility of an applicant to obtain all necessary permits, rights-of-way, and the like before Niagara Mohawk can run the necessary equipment, wiring, and hardware to the location.

(R. 572-573).

Moreover, the Tuscarora Nation itself submitted *amicus* papers at the trial court (R. 529-550), the Fourth Department and the New York State Court of Appeals arguing that Petitioner's complaint cannot proceed in the Nation's absence. The Tuscarora Nation explicitly stated that it is an indispensable party to any legal proceeding regarding utility usage on the Tuscarora Indian Reservation, and that, consequently, no legal proceeding may proceed without its presence. (R. 532). In addition, the Tuscarora Nation explicitly asserted that it would be clearly prejudiced if **this** case were to proceed in its absence. (R. 534-542). The Tuscarora Nation's directive was to prevent non-enrolled Tuscaroras from residing on tribal land (R. 33-34) and to allow the Nation ". . . to enforce regulations pertaining to land use and economic development on the Reservation" (R. 533). The Tuscarora Nation's participation as a party in the adjudication of Petitioner's statutory claims is required because a judgment in favor of Petitioner would involve a determination of the Nation's rights and powers and would violate its sovereignty as an Indian Nation. Petitioner's contention that the sworn testimony of Tuscarora Chief Webster Cusick is directly contrary to Niagara Mohawk's position (Petition for Certiorari at 13) is false. On the contrary, Chief Cusick testified that Petitioner was aware of the tribal consent requirement before Petitioner contacted Niagara Mohawk for new electric service (R. 129).

There is nothing in the record to support Petitioner's contention that the *Anderson v. Town of Lewiston*, 665 N.Y.S.2d at 164, matter is "moot" because "the Town of Lewiston never followed through on its threat to shut off plaintiffs' [sic] water

in that case." (Petition for Certiorari at 14). The fact that *Niagara Mohawk Power Corporation v. Anderson*, 685 N.Y.S.2d at 503, and *Anderson v. Town of Lewiston*, 665 N.Y.S.2d at 165, were not accepted for review by the New York State Court of Appeals, in no way means that the issues implicated by the Tuscarora Nation's sovereign immunity and its status as an indispensable party had not been considered by New York or federal courts.

In the instant proceeding, neither Petitioner nor Niagara Mohawk can adequately represent the interests of the Tuscarora Nation. Notably, it is in Niagara Mohawk's interest as a seller of electricity not to be bound by the Tuscarora Nation's constraints with respect to the delivery of electricity to applicants located on the Tuscarora Indian Reservation. Petitioner is also in an adverse relationship to the Tuscarora Nation both with respect to the issue at bar and his long-standing feud with the Nation as evidenced by Petitioner's historical disregard for tribal laws and actions to further his own self-interests. As described by Robert B. Porter:

> By 1994, Anderson had developed a new plan for effectuating business development within the Tuscarora Nation — he initiated efforts to overthrow the Council of Chiefs and to establish a new form of government, the "Tuscarora Tribal Business Council."

*Building a New Longhouse: The Case for Government Reform Within the Six Nations of the Haudenosaunee*, 46 Buff. L. Rev. 805, 882 (Fall 1998). *See also* Agnes Palazzetti, *Indian-made Gasahol, Cigarettes at Issue*, The Buffalo News, May 1, 1997, at 1B ("But Anderson refuses to recognize Chief Leo Henry, who signed the agreement [with the State of New York relating to State of New York's efforts to enforce tax laws] for the Tuscaroras as the leader of the Chief's Council. Anderson . . . also refuses to apply for a tribal business license as stipulated in the Agreement"); Agnes Palazzetti, *Chiefs*

*Launch Effort to Close Bingo Hall*, The Buffalo News, March 18, 1994 (" . . . the Chief's charged that Anderson was defying the Tuscarora's traditional laws that forbid any form of gambling on Tuscarora territory"); Agnes Palazzetti, *Rebels Launch Campaign to Remove Tribal Chiefs, Want Federal Bureau of Indian Affairs to recognize new Governing Bodies*, The Buffalo News (March 27, 1994) ("In defiance of the Chief's Council, Anderson . . . formed a new government which authorized the bingo games . . .")

In short, the Fourth Department decision does not reflect a *per se* ban, but rather recognizes the fact that given the threat to the Tuscarora Nation's sovereignty, the prejudice which may accrue from the non-joinder of the Nation is significant, and the case may not proceed without the Nation's presence.

## II. The Dismissal Order of Petitioner's Complaint does not Conflict with 25 U.S.C. § 233.

Petitioner's contention that the Fourth Department's dismissal order conflicts with Congress' grant of jurisdiction to New York courts 25 U.S.C. § 233 over civil disputes between Indians and non-Indians in violation of the Supremacy Clause of the United States Constitution (Article VI, Cl. 2) and deprives Petitioner of due process or equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution (Petition for Certiorari at 12-16) has already been addressed on numerous occasions by federal courts in applying the indispensable party analysis found at Fed. R. Civ. P. 19 to Indian Nations. Federal courts have consistently recognized that the application of the law relating to indispensable parties may leave no forum available for the resolution of the claims asserted. As noted earlier in *Fluent*, "[t]he Appellants' contention that tribal immunity does not bar federal jurisdiction when no other forum is available for the resolution of claims, must fail . . . 'Sovereign immunity may leave a party with no forum for [that party's] claims'." *Fluent*, 928 F.2d at 547.

25 U.S.C. § 233 does not constitute Congressional abrogation of a Tribe's immunity from suit. Rather, in enacting 25 U.S.C. § 233 Congress specifically limited the jurisdiction of New York State courts ". . . to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings . . ." That is, the state joinder rules found at CPLR 1001-1003 still apply, as does the case law with respect to the Tuscarora Nation's sovereign immunity from suit as an Indian Tribe.

In *Bowen v. Doyle*, 880 F. Supp. 99 (W.D.N.Y. 1995) (Petition for Certiorari at 12), United States District Judge Richard Arcara discussed in length the history, intent and meaning of 25 U.S.C. § 233. After reviewing relevant law and well-established principles applicable to a sovereign nation, Judge Arcara held that 25 U.S.C. § 233 did not constitute abrogation of an Indian Nation's sovereign immunity from suit:

> These cases all support the proposition that an Indian Tribe's right to self-government cannot be abrogated absent an unequivocal expression of Congress' intention to do so. Section 233 is not such an expression. The plain language of § 233 does not authorize courts of the State of New York to become embroiled in internal political disputes amongst officials of the Nation's government. If it were Congress' intent to allow the State Courts to have jurisdiction over such disputes, it would have expressly said so, but it did not. Significantly, § 233 does not provide for State Court jurisdiction over suits against the Nation itself. Had Congress intended to abrogate the Nation's rights to self-government and exclusive jurisdiction over internal affairs, it would have made sense for Congress to provide for State Court jurisdiction over suits against the Nation.

*Bowen*, 880 F. Supp. at 118.

As set forth above, the Fourth Department did not ". . . disassociate [itself] from federal law or refuse to exercise jurisdiction bestowed by Congress because they have a disagreement with the federal law or refusal to recognize the superior authority of its source." (Petition for Certiorari at 15). On the contrary, the Fourth Department correctly applied well-settled principals of federal and state law which precludes the adjudication of a controversy in which the rights of an Indian Nation would be adversely impaired.

Petitioner's reliance upon *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 380 (1990); *Testa v. Katt*, 330 U.S. 386 (1947); *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876); and *Mondue v. New York N.H.&H.R. Co.*, 223 U.S. 1, 58 (1912) at page 15 of his Petition is well off the mark. As stated above, 25 U.S.C. § 233 does not constitute congressional abrogation of the Tuscarora Nation's sovereign immunity from suit. "It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' " *Santa Clara Pueblo v. Martinez*, 436 U.S. at 59 (quotation omitted). 25 U.S.C. § 233 is devoid of an implicit (let alone an explicit) waiver of the Tuscarora Nation's sovereign immunity from suit, nor does 25 U.S.C. § 233 mandate the assertion of jurisdiction in every case involving a Native American irrespective of the joinder rules and case law relating to sovereign immunity from suit. On the contrary, 25 U.S.C. § 233 explicitly limits the jurisdiction of the courts of the State of New York "to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings. . . ."

Petitioner's contention that the dismissal order

> . . . deprive[s] Native Americans of their Fifth and Fourteenth Amendment rights to due process and equal protection of the laws, in contravention of the principles established by the Court beginning with *Griffin v. Illinois*, 351 U.S. 12 (1956) (access to

> appeals in criminal cases) and *Boddie v. Connecticut*, 401 U.S. 371 (1971) (access to the judicial process in civil cases)

(Petition for Certiorari at 15) is also well off the mark. Notably, neither of these cases involved the threat to Indian sovereignty at issue in this proceeding. On the contrary, at issue in *Boddie* were certain state procedures requiring the payment of filing fees as a prerequisite to the commencement of litigation which welfare recipients alleged restricted their access to courts to bring actions to dissolve marriages. In reversing a determination upholding the state statute, this Court held:

> Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

*Boddie*, 401 U.S. at 784.

Although this Court overturned the state procedure, this Court took special care to note that the Due Process Clause does not create an absolute right to civil redress through the judicial process. Indeed, if that were the case, Fed. R. Civ. P. 19, similar state procedural rules relating to the joinder of indispensable parties, and well-settled case law that precludes the adjudication of controversies in which the rights of an Indian Nation are prejudiced would have been overturned by the *Boddie* case. Instead, the *Boddie* court stressed:

> In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court

> to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the bona fides of both appellants' indigency and desire for divorce are here beyond dispute. *We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive pre-condition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus, we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.* (Emphasis added.)

*Boddie*, 401 U.S. at 788-89.

Petitioner's comparison between the dismissal order in this case and in *Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999) (Petition for Certiorari at 17) is strained. As described above, 25 U.S.C. § 233 is still subject to the doctrines and legal principles of sovereign immunity and joinder of necessary parties. Indeed, in *Thomas*, the Seventh Circuit explicitly detailed Congress' exercise of its powers to qualify or limit the tribal sovereignty with respect to elections affecting tribal constitutions. The Seventh Circuit stated, "the IRA (Indian Reorganization Act) explicitly reserves to the federal government the power to hold and approve the elections that adopt or alter tribal constitutions." The Seventh Circuit held that by passing 25 U.S.C. § 476 in its present version:

> Congress thereby refused to reflect the tribal interest in the legal structure of tribal constitution elections, notwithstanding the core values of government and self-determination to the tribal constitution necessarily embodies.

*Thomas*, 189 F.3d at 668.

Congress' exercise of its power to carve out an interest from the Tribe's sovereign immunity in the IRA is entirely different than what exists in 25 U.S.C. § 233, which in no way limits an Indian Nation's sovereign immunity from suit. Moreover, as contrasted with the statute at issue in *Thomas*, Congress took special care in enacting 25 U.S.C. § 233 to limit the jurisdiction of New York State courts: ". . . to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings . . ."

In sum, the Fourth Department's unanimous decision was consistent with its prior unanimous decisions in *Anderson v. Town of Lewiston*, 665 N.Y.S.2d at 164 and *Niagara Mohawk v. Anderson*, 685 N.Y.S.2d at 503, and longstanding case law which precludes the adjudication of claims, absent Congressional abrogation or tribal consent, which may impair, impede, or prejudice the rights of an Indian Nation.

**III. The Fourth Department's Order does not Conflict with Federal Circuit Courts of Appeals Decisions. The Fourth Department Decision Follows Well-Settled Principles of Federal and State Law.**

There is no conflict with a prior decision of this Court, or a conflict of authority between the Courts of Appeal (Petition for Certiorari at 16-18) or state courts of last resort. As detailed in Point I, *infra*, the Fourth Department applied well-settled principles of federal and state law in dismissing Petitioner's complaint for the non-joinder of the Tuscarora Nation.

The Fourth Department correctly relied upon its prior decisions in *Anderson v. Town of Lewiston*, 665 N.Y.S.2d at 164, and *Niagara Mohawk Power Corp. v. Anderson*, 685 N.Y.S.2d at 503, which similarly and unanimously affirmed dismissal of claims relating to utility usage by a Tuscarora Native American on the Tuscarora Indian Reservation for the non-joinder of the Tuscarora Nation.

Petitioner erroneously contends that the Fourth Department's order conflicts with *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir. 2000); *Thomas*, 189 F.3d at 662; and *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999) (Petition for Certiorari at 16-17). Initially, Petitioner has failed to establish that the Fourth Department was required to apply federal decisional authority to the state procedural rules (CPLR 1001-1003) forming the basis of the dismissal of this proceeding. Notably, the Petitioner chose the state court forum. In doing so, Petitioner became subject to the state procedural rules, including the state procedural rules regarding necessary parties and the interpretation of those rules by the state courts. Even recognizing that the state procedural rule was modeled on the Federal Rules of Civil Procedure, nonetheless, the rule is a *state procedural rule*. The interpretation by the Fourth Department of the state procedural rule does not create any conflict with federal law, the Federal Rules of Civil Procedure, or federal court decisions interpreting the Federal Rules of Civil Procedure. The fact that a state court may interpret a state procedural rule modeled upon a federal rule in a manner which is not the same as a federal court interpretation of the federal rule upon which the state rule is modeled does not constitute a violation of any federal right and does not create a conflict between state court decisional authorities and federal court decisional authorities which justifies, much less compels, the exercise of this Court's discretionary authority to review a state court decision.

Notwithstanding the foregoing, as set forth in Point I, *infra*, the Fourth Department did not commit any error in resolving the issue of the status of the Tuscarora Nation as an indispensable party to the state court proceeding.

Petitioner incorrectly cites the "holding" of *Bassett*, 204 F.3d at 343, at page 16 of his Petition for Certiorari. The Second Circuit in *Bassett* did not hold ". . . that a tribe was not an indispensable party to a film producer's contract, tort, and copy infringement claims." (Petition for Certiorari at 16). Although the Second Circuit found that the lower court incorrectly dismissed the film producer's tort and copy infringement claims for non-joinder of the tribe, the Second Circuit did **not** hold that plaintiff could proceed with his breach of contract claims (the claim at issue in this proceeding) as a matter of law absent the joinder of the tribe. Instead, the Second Circuit remanded the matter to the lower court for reconsideration as to whether the breach of contract claims may be maintained absent the joinder of the tribe. *Bassett*, 205 F.3d at 360. Although the Second Circuit found that the lower court abused its discretion as a matter of law in dismissing plaintiff's copyright infringement and tort claims given the non-joinder of the tribe, with respect to the treatment of the breach of contract claims, the Second Circuit noted:

> Somewhat different concerns are raised by the district court's finding that the Tribe is an indispensable party to [plaintiff's] claim of breach of contract against the Museum. *Claims for breach of contract may be more susceptible to dismissal under Rule 19(b) than claims sounding in copyright and tort*, as the individual responsibility of each actor is defined by the contract and does not necessarily result in joint and several liability. *There may be better reasons to support a dismissal under Rule 19(b) as to the contract claim*. But once again,

> the district court furnished no analysis that could guide our review. (Emphasis added.)

*Id.*

Moreover, the *Bassett* matter is clearly distinguishable from the case at bar because it did not involve an Indian Nation's right to self-governance nor an Indian Nation's sovereign right to control its borders at issue in the instant proceeding.

The fact that the Fourth Department did not explicitly "explain how the Tuscarora Nation's interest might be harmed" (Petition for Certiorari at 16-17) does not establish "compelling" reasons for this Court to grant certiorari. Aside from the fact that the Fourth Department was not required to apply federal decisional law to the state procedural rule, the instant proceeding was the *third* occasion in which the Fourth Department ruled on an identical issue. As such, the Fourth Department was intimately familiar with the legal issue. In dismissing Petitioner's complaint for the non-joinder of the Tuscarora Nation, the Fourth Department explicitly relied upon its prior decisions in *Niagara Mohawk Power Corp. v. Anderson*, 685 N.Y.S.2d at 503, and *Anderson v. Town of Lewiston*, 665 N.Y.S.2d at 165. In its prior decision of *Niagara Mohawk Power Corporation v. Anderson* (decided less than eight months prior to its decision in the instant proceeding), the Fourth Department explained that dismissal of counterclaims alleging that Niagara Mohawk wrongfully failed to provide utility service on the Tuscarora Reservation for failure to join the Tuscarora Nation was required:

> Because resolution of this controversy involves a determination of the rights and powers of the Indian Nation to consent to [electrical] service on its Reservation, complete relief cannot be accorded [defendant and intervenors] without the Indian Nation as a party. Furthermore, because a judgment in [defendant's and intervenors'] favor would

> challenge the power of the Indian Nation, the Indian Nation might be 'inequitably affected' by this litigation.

*Niagara Mohawk Power Corp.*, 685 N.Y.S.2d at 503, *quoting Anderson v. Town of Lewiston*, 665 N.Y.S.2d at 164, *citing City of New York v. Long Is. Airports Limousine Serv. Corp.*, 48 N.Y.2d 469, 475, 476 (1979).

Petitioner's citation to *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999) (Petition for Certiorari at 17) for the proposition that the Seminole Indian Nation was not a *per se* indispensable party to a proceeding involving the establishment of rights to tribal trust funds wrongly implies that the Fourth Department found that Tuscarora Nation was a *per se* indispensable party. The Fourth Department did not hold that the Tuscarora Nation is an indispensable party merely because of its status as a sovereign nation. On the contrary, the Fourth Department relied upon its prior decisions in *Niagara Mohawk Power Corp. v. Anderson* and *Anderson v. Town of Lewiston* which held that the Tuscarora Nation was an indispensable party to proceedings involving utility service to the Tuscarora Indian Reservation finding on both occasions that the Nation might be prejudiced should the case proceed in its absence.

## IV. The Relief Petitioner Seeks Would Overturn Federal and State Procedural Rules Which Prohibit the Adjudication of a Controversy Absent the Joinder of an Indispensable Party.

Petitioner's contention that the dismissal order results in a jurisdictional void (Petition for Certiorari at 18-19) ignores a plethora of case law (referenced at Point I, *infra*.) which precludes the litigation of suits in which an Indian Nation is an indispensable party to the proceeding. Indeed, courts have consistently recognized that the application of the law relating to indispensable parties may leave no forum available for the

resolution of the claims asserted. The Second Circuit explained in *Fluent*:

> [T]he Petitioners' contention that tribal immunity does not bar federal jurisdiction when no other forum is available for the resolution of claims, must fail . . . "sovereign immunity may leave a party with no forum for [that party's claims]."

*Fluent*, 928 F.2d at 547.

Moreover, the relief Petitioner seeks would overturn Fed. R. Civ. P. 19, state procedural rules relating to the joinder of parties, and well-settled case law relating to the sovereign immunity doctrine.

In short, Petitioner has failed to establish compelling grounds for this Court to exercise its discretionary jurisdiction.

## CONCLUSION

For the aforesaid reasons, Respondent Niagara Mohawk Power Corporation respectfully prays that the Petition for Writ of Certiorari filed by Petitioner Joseph M. Anderson be denied.

Respectfully submitted,

MARK R. MCNAMARA
*Counsel of Record*
SAMUEL J. BURRUANO, JR.
HISCOCK & BARCLAY, LLP
*Attorneys for Respondent*
*Niagara Mohawk Power Corporation*
50 Fountain Plaza, Suite 301
Buffalo, New York 14202-2291
(716) 856-0911

# APPENDIX

## APPENDIX A — LETTER FROM TUSCARORA CHIEF LEO R. HENRY TO GERALD O'NEILL DATED AUGUST 26, 1993

**HAUDENOSAUNEE**
**TUSCARORA NATION**
**2006 MT. HOPE ROAD —**
**VIA: LEWISTON, NEW YORK 14092**

August 26, 1993

Mr. Gerald N. O'Neill
District Manager
Niagara Mohawk Power Corporation
1720 New Road
Niagara Falls, New York 14304

Dear Mr. O'Neill:

"GREETINGS"

I extend "Greetings" on behalf of the Chiefs, Clan Mothers and the People of the Tuscarora Nation. We wish to thank you for your time and understanding as we met with you and Mr. Mitchell on August 24, 1993 regarding service within the territory of the Tuscarora Nation and the discussion of the contract.

This is to reaffirm the Councils position and our agreeing that, that NO electrical service will be made within the territory of the Tuscarora Nation without the written consent, (authorization) of the Tuscarora Chiefs in Council. If you have any questions, feel free to call. Further we look forward

to future meetings regarding the contract and other matters discussed.

Thank you for your cooperation, and we look forward to meeting in the near future.

ONEH!

s/ Chief Leo R. Henry
Chief Leo R. Henry, Clerk
Tuscarora Nation

cc:Murdock Mitchell

## APPENDIX B — LETTER FROM KIMBERLY SCHECHTER TO GERALD O'NEILL DATED SEPTEMBER 3, 1993

BORINS, HALPERN & STROMBERG
ATTORNEYS AT LAW
OFFICE AND MAILING ADDRESS
418 BRISBANE BUILDING
603 MAIN STREET
BUFFALO, NEW YORK 14203

TELEPHONE (716) 854-5600
TELECOPIER (716) 854-4512

* * *

September 3, 1993

Gerald O'Neill
District Manager
Niagara Mohawk Power Corporation
1720 New Road
Niagara Falls, New York 14304

Re: Applications for service to the Tuscarora Indian Reservation in Lewiston, New York

Dear Mr. O'Neill:

I am writing to confirm our telephone conversation of today. As I stated, we represent the Tuscarora Indians living on the reservation in Lewiston, New York. I understand that you have met with various chiefs from the reservation concerning utility hook-ups. You have advised the chiefs

that Niagara Mohawk will honor, until further notice, an agreement not to hook up any service whatsoever on the Tuscarora reservation until written approval has been obtained from the Council of Chiefs. They are particularly concerned that service will be supplied, without council approval, to a building being erected by Joseph Anderson at Route 104 and Indian Hill Road to be used as a bingo hall.

I further understand that your policy may change, depending on the outcome of Niagara Mohawk's lawsuit concerning the Seneca Nation's Tonawanda Reservation, or other factors, and request that if your policy in relation to either the Tuscarora or Tonawanda Indian reservation changes, that you notify this office immediately.

Thank you.

Very truly yours,

s/ Kimberly Schechter
Kimberly Schechter

KS/ac
cc/Chief Leo Barry
Chief Bernard Parker

## APPENDIX C — EXCERPT FROM SEPTEMBER 1993 EDITION OF THE TUSCARORA HEALTH CENTER NEWSLETTER

TUSCARORA HEALTH CENTER NEWSLETTER

* * *

### NEWS FROM THE REZ

NOTICE

A meeting was held on August 24, 1993, between Members of the Tuscarora Nation's Council of Chiefs and representatives of the Niagara Mohawk Power Corp.. Until such time, it was agreed by both parties that as of the above date, no electrical services will be made by the Niagara Mohawk Power Corp. within the territory of the Tuscarora Nation, without the specific written concent of the Tuscarora Chief's Council.

* * * *

(3)
Supreme Court, U.S.
FILED
AUG 14 2000
CLERK

No. 00-73

IN THE

# Supreme Court of the United States

October Term, 1999

JOSEPH M. ANDERSON,

*Petitioner,*

vs.

NIAGARA MOHAWK POWER CORPORATION,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FOURTH JUDICIAL DEPARTMENT.

## BRIEF ON BEHALF OF *AMICUS CURIAE* TUSCARORA NATION OF INDIANS SUPPORTING NIAGARA MOHAWK POWER CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HAROLD M. HALPERN, ESQ.
*Counsel of Record*
BORINS, HALPERN, STROMBERG & PASKOWITZ
KENDRA E. WINKELSTEIN, ESQ.,
*Of Counsel*
520 Brisbane Building
403 Main Street
Buffalo, New York 14203
Telephone: (716) 852-8188

*Attorneys for Amicus Curiae Tuscarora Nation of Indians*

BATAVIA LEGAL PRINTING, INC.—Telephone (716) 768-2100

2588

# TABLE OF CONTENTS


| | | Page |
|---|---|---|
| TABLE OF AUTHORITIES | | iii |
| INTRODUCTION | | 1 |
| 1. | The Interest of amicus curiae | 1 |
| 2. | Summary of Argument | 2 |
| ARGUMENT | | |
| I. | Factual Background and Related Legal Proceedings | 3 |
| II. | Reasons for Denying the Writ | 6 |
| a. | The Appellate Division did not Abuse its Discretion in Dismissing this Action for Failure to Join an Indispensable Party | 6 |
| 1. | The Tuscarora Nation is a necessary party | 6 |
| 2. | The Appellate Division did not abuse its discretion in dismissing the action | 9 |
| b. | The Reasons Advanced by the Petitioner for Granting the Writ are Without Merit | 12 |

1. The dismissal does not conflict with Congress' express grant of jurisdiction pursuant to 25 U.S.C. 233 12

2. The type of remedy sought by Petitioner not alter the Tuscarora Nation's status as a necessary party 14

3. The Order of the Appellate Division does not violate the Supremacy Clause 16

4. There has been no violation of the Constitutional rights of Native Americans 17

5. The Order of the Appellate Division does not conflict with federal case law 18

CONCLUSION 20

## TABLE OF AUTHORITIES


| | Page(s) |
|---|---|
| **Federal Cases:** | |
| Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343 (2 Cir. 2000). | 19 |
| Bowen v. Doyle, 880 F.Supp. 99 (W.D.N.Y. 1995). | 12 |
| Davis v. United States, 192 F.3d 951 (10 Cir. 1999). | 19 |
| Enterprise Management Consultants, Inc. v. U.S. ex rel. Hodel, 883 F.2d 890, (10th Cir. 1989). | 10 |
| Fluent v. Salamanca Indian Lease Authority, 928 F.2d 542 (2d Cir. 1991). | 10, 18 |
| Howlett by and through Howlett v. Rose, 496 U.S. 356 (1990). | 17 |
| Niagara Mohawk v. Tonawanda Band, et al., 862 F.Supp. 995 (W.D.N.Y. 1994). | passim |
| Provident Tradesmens Bank v. Patterson, 390 U.S. 102 (1968). | 10 |
| Santa Clara Pueblo v. Martinez, 36 U.S. 49 (1978). | 11 |

Shermoen v. U.S., 982 F.2d 1312
(9th Cir. 1992). 10

Thomas v. United States, 189 F.3d 662
(7 Cir. 1999). 18, 19

Wichita and Affiliated Tribes, 788 F.2d 765
(D.C.Cir. 1986). 10, 11

**State Cases :**

Anderson v. Town of Lewiston, 244 A.D.2d 965
(4 Dept. 1997), appeal dismissed,
91 N.Y.2d 920 (1998). 5, 15, 19

Joanne S. v. Carey, 115 A.D.2d 4
(1 Dept. 1986) 9

Niagara Mohawk v. Anderson, 258 A.D.2d 958
(4 Dept. 1999) 5, 18, 19

**Federal Statutes:**

25 U.S.C. section 233 passim

**Federal Regulations:**

25 C.F.R. 169.22(b) 3

**State Statutes:**

New York CPLR 1001, 1003 passim

## INTRODUCTION

Upon the written consent of both parties, the Tuscarora Nation of Indians ("Tuscarora Nation") submits this Brief amicus curiae[1] in opposition to the Petition for Writ of Certiorari filed by Petitioner Joseph M. Anderson and in support of Respondent Niagara Mohawk Power Corp. ("NMPC").

### 1. The Interest of the Amicus Curiae.

The genesis of this lawsuit was the decision by the Tuscarora Nation to require the prior written consent of the Nation as a condition to the provision of electric service to its territory. The consent requirement enables the Nation, as a practical matter, to enforce Nation regulations pertaining to land use and economic development within its territory. Petitioner filed suit in New York Supreme Court, seeking damages against Respondent for breach of a contract to provide electric service without the Nation's consent to businesses operated illegally by Petitioner on Tuscarora territory. The Appellate Division, Fourth Judicial Department, ("Appellate Division"), dismissed Petitioner's action pursuant to New York CPLR 1001 and 1003 for failure to join the Nation as a party .[2] The New

---

[1] No counsel for a party authored any part of this brief, and no person or entity other than the amicus curiae made any monetary contribution to the preparation or submission of this brief.

[2] The Tuscarora Nation enjoys sovereign immunity from suit and cannot be joined as a party without its consent. Petitioner does not challenge that fact. Consent has not and will not be given.

York Court of Appeals declined to review the case and this Petition followed.

There is no issue raised in this case which does not implicate the Nation's sovereign authority to regulate the provision of electric service to its territory. Although Petitioner styles the action as a purely private dispute between the individual parties, there is no question that his real target is the consent requirement and, ultimately, the tribal authority which imposed it. Entertainment of actions such as this one in the New York courts threaten both the political and territorial integrity of the Nation.

## 2. Summary of Argument

The Order of the Appellate Division is consistent with applicable state, federal and Constitutional law. There is therefore no reason at all, let alone a "compelling" one, for granting the Petition. Petitioner's argument that the Nation could not be "inequitably affected" by a money judgment against the Respondent is plainly without merit. The Nation has a critical interest in the subject matter of this action. Regardless of the type of remedy sought, Petitioner can prevail only by establishing that NMPC was contractually obligated to supply him with electric service in violation of the Nation's consent requirement.

The dismissal of this action for failure to join the Tuscarora Nation as a party does not conflict with the jurisdictional grant contained in 25 U.S.C. 233. Section 233 affects neither the Nation's interest in regulating the provision of electric service to its territory nor its status as an indispensable party in actions in which that interest is directly implicated. Because the dismissal does not conflict with the jurisdictional grant, it violates neither the Supremacy Clause nor the Fifth or Fourteenth

Amendments. The dismissal also does not conflict with federal and New York caselaw addressing the question of Indian nations as indispensable parties. In fact, the only "conflict" apparent in this case is that between the willingness of the Appellate Division to acknowledge the Tuscarora Nation's sovereign power to regulate the provision of electric service to its territory and Petitioner's willful refusal to do the same. The fact that Petitioner cannot bring himself acknowledge Tuscarora sovereignty over its internal affairs, despite the consistent reaffirmation of that sovereignty in both federal and State courts, does not entitle him to a hearing in yet another forum.

## ARGUMENT

### I. Factual Background and Related Legal Proceedings

Several Haudenosaunee Nations, including the Tuscarora, require the Nation's written consent prior to the provision of electric service to Nation territory. [R. 39]. The consent requirement enables the Nations, as a practical matter, to enforce regulations pertaining to land use and economic development within their territories.[3]

Faced with the choice of providing either "non-discriminatory" service in violation of the Nations' consent requirement or providing "discriminatory" service in violation of the regulations of the New York State Public

---

[3]The Nations' consent requirement is consistent with 25 C.F.R. 169.22(b), which provides that no agreement between an occupant of tribal lands and a utility provider shall be valid "unless its execution shall have been duly authorized in advance of construction by the governing body of the Indian tribe whose land is affected."

Service Commission ("PSC"), regulations referenced in NMPC's sixty-year-old Franchise Agreements with the Nations, NMPC chose to suspend all new electric service hook-ups. NMPC then brought a declaratory judgment action in the U.S. District Court for the Western District of New York against the Tonawanda Nation and certain individual tribal members seeking a determination of its rights and obligations in light of the apparent conflict between that Nation's consent requirement on the one hand and its obligation to provide non-discriminatory service to its customers on the other. Individual tribal members counterclaimed or sought to intervene in the federal action, seeking injunctive relief and/or damages for NMPC's refusal to provide them with service in the absence of the Nation's consent. The entire action was dismissed and the motion to intervene was denied on the grounds, inter alia, that the Tonawanda Nation was an indispensable party to all claims asserted and could not be joined due to sovereign immunity. Niagara Mohawk v. Tonawanda Band, et al., 862 F.Supp. 995 (W.D.N.Y. 1994).

NMPC next sought help from the State of New York, requesting a declaratory ruling from the PSC on the applicability of PSC regulations to the provision of electric service to Indian Nation territory. [R. 169-181]. In a decision issued April 19, 1995, the PSC substantially adopted the Nations' position, ruling that federal, not State, law was controlling with respect to Indian affairs, that there had been no federal delegation of regulatory authority to the PSC, and that PSC regulations would be applicable to the provision of electric service on Tonawanda and Tuscarora territory if, and only if, the Franchise Agreements in which the regulations were referenced were retroactively approved by the federal government. [R. 61-65; Petition A16 - A21].

NMPC then took the next logical step of requesting the U.S. Department of the Interior, Bureau of Indian Affairs ("BIA"), to retroactively approve the Franchise Agreements. In a letter decision dated January 29, 1996, the BIA declared the Franchises void ab initio, stating that the Franchise Agreements violated 25 U.S.C. 177 (Non-Intercourse Act) as well as the federal regulations which govern the granting of rights-of-way for electric service lines on Indian lands. [R. 55-67]. By Order dated July 23, 1998, the Interior Board of Indian Appeals affirmed.

The PSC Decision, coupled with the determination of the federal government that the Franchise Agreements are void, established that the PSC had no regulatory authority over NMPC's provision of electric service to Indian territories and paved the way for negotiations between NMPC and the Indian Nations for agreements for the provision for electric service to Indian territories in a manner consistent with both Indian sovereignty and federal law, negotiations which are threatened by NMPC's continued exposure to lawsuits like this one.

Subsequent attempts to hold utility service providers liable in New York courts for failure to supply service in violation of the Tuscarora Nation's consent requirement have been dismissed for failure to join the Nation as a party. Those cases include Niagara Mohawk v. Anderson, 258 A.D.2d 958, 685 N.Y.S.2d 502 (4 Dept. 1999) (counterclaim for failure to provide electrical service based on franchise agreement) and Anderson v. Town of Lewiston, 244 A.D.2d 965 (4 Dept. 1997)(action for failure to supply water based on separate agreement). The New York courts have consistently recognized that any determination of such actions would significantly undermine the Nation's sovereignty.

## II. Reasons for Denying the Writ.

### a. The Appellate Division did not Abuse its Discretion in Dismissing this Action for Failure to Join an Indispensable Party.

#### 1. The Tuscarora Nation is a necessary party.

CPLR 1001[a] provides that persons "who ought to be joined if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants" (emphasis supplied). Petitioner cannot prevail in this action unless the court makes a finding that either the 1937 Franchise Agreement (the basis of Appellant's second cause of action) or the "Electric Service Agreement" (the basis of Appellant's first cause of action), obligates NMPC to enter onto the Nation's territory and supply Appellant with electricity in violation of the Nation's consent requirement, effectively nullifying the consent requirement.

Any award of money damages would inequitably affect the Nation in that it would promote tribal factionalism by providing an incentive to any other tribal member who finds himself at odds with his nation to enter into similar agreements designed to circumvent tribal regulation and undermine tribal sovereignty, secure in the knowledge that even though actual performance of such agreements cannot be enforced against the will of the Nation, he can nonetheless expect a windfall in the courts. Even if Petitioner did not ultimately prevail, the fact that the Nation's consent requirement had been subjected to the scrutiny of the State courts would erode the Nation's sovereignty and set the stage for further attempts by

Petitioner or any other individual to attack Tuscarora law in State courts. In addition, any willingness on the part of the New York courts to entertain actions that seek to impose liability on third parties such as NMPC for complying with the directives of Indian nations will inevitably hamper those nations in their on-going efforts to enter into legitimate agreements with NMPC and other providers of essential services, to the detriment of all residents of Indian territories. The Nation is therefore a necessary party.

In NMPC v. Tonawanda Band, et al., supra, the District Court was faced with the precise issue presented by Petitioner's second cause of action: whether an Indian nation is an indispensable party in an action by reservation residents against NMPC for breach of its Franchise Agreement with the Nation.[4] In that case, the court held:

> The interest of the Tonawanda Band which is at the center of this dispute is its claimed right under the agreement to prior approval of Niagara Mohawk's provision of electrical power to reservation residents, and a determination on the merits of the counterclaim by the non-moving Defendants against Niagara Mohawk could impair or impede the tribe's ability to exercise that right. That is, a determination in favor of the non-moving Defendants would, in essence if not in substance, result in a holding that Niagara Mohawk has wrongfully refused to provide those applicants with electrical power and that prior approval by the

---

[4]NMPC's Franchise Agreement with the Tuscarora Nation is in all material respects identical to its Franchise Agreement with the Tonawanda Nation.

> Tonawanda Band is not required. Thus, the very issue precipitating this action--i.e., whether the franchise agreement requires the tribe's approval prior to Niagara Mohawk's provision of electrical services to a user on the Reservation--could be decided adversely to the tribe without its ever having had the opportunity to protect its interest as a party to the agreement.

862 F.Supp. at 1003-1004. The court went on to dismiss the action in its entirety for failure to join an indispensable party, emphasizing the "paramount importance" of sovereign immunity, and the potential prejudice to the Tonawanda Nation were the action to proceed in its absence. id. at 1004. Likewise, in Niagara Mohawk Power Corp. v. Anderson, supra, the Appellate Division dismissed a Franchise Agreement-based counterclaim for failure to join the Tuscarora Nation as a party on the grounds that "[b]ecause . . . a judgment in [defendant's and intervenors'] favor would challenge the power of the Indian nation, the Indian Nation might be 'inequitably affected' by this litigation." 685 N.Y.S.2d at 503 (quoting Anderson v. Lewiston, supra, 244 A.D.2d at 966.

Petitioner's first cause of action is not premised on the Franchise Agreement but on an agreement between the Petitioner and NMPC [R. 45-46]. The Tuscarora Nation's interest in regulating the provision of electric services on its territory, however, remain the same. From the Nation's perspective, it is immaterial whether the claim is premised on the Franchise Agreement or on a separate agreement. Any determination by the court that NMPC had a valid and binding obligation to enter onto Tuscarora territory and supply the plaintiff with electrical power without the Nation's consent undermines the sovereign power of the Tuscarora Nation to regulate access to and the provision of

electric service on its territory. If anything, the fact that the first cause of action is premised on an agreement which, if enforceable, would have the affect of bypassing the Nation entirely, represents an even greater threat to the Nation's sovereignty than the second cause of action, which at least is premised on an alleged agreement by the Nation to permit the defendant access to its territory.

**2. The Appellate Division did not abuse its discretion in dismissing the action.**

As set forth, supra, the Nation has a critical interest in the subject matter of this action and is therefore "a person who should be joined under subdivision (a) [of CPLR 1001]," CPLR 1001(b), but cannot be joined due to sovereign immunity. It is plain that under these circumstances the Appellate Division did not abuse its discretion in determining that the action should not proceed in the Nation's absence.

The rationale for dismissal of actions and proceedings to which an Indian nation is a necessary party but cannot be joined due to sovereign immunity has been explored thoroughly in federal caselaw. Because the considerations relevant to determinations pursuant to FRCP Rule 19 are essentially identical to those relevant to determinations under CPLR 1001(b)/1003, see, e.g., Joanne S. v. Carey, 115 A.D.2d 4 (1 Dept. 1986), the analysis of the interplay between the doctrine of tribal sovereign immunity and the doctrine of the indispensable party in the federal caselaw is persuasive authority for the disposition of this case as well.

Not all of the factors listed in FRCP 19 (b) and CPLR 1001 (b) are given equal weight in deciding whether to dismiss an action for non-joinder. This Court has

explained that "the decision whether to dismiss . . . must be based on factors varying with different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." Provident Tradesmens Bank v. Patterson, 390 U.S. 102 (1968). One factor that is of "paramount importance" in indispensable party analysis is the doctrine of sovereign immunity. Fluent v. Salamanca Indian Lease Authority, 928 F.2d 542, 548 (2 Cir. 1991) When a necessary party is immune from suit there is very little room for balancing of other factors set out in rule 19(b), because immunity may be viewed as one of those interests 'compelling by themselves.'" Id. See also, Shermoen v. U.S., 982 F.2d 1312, 1317 (9th Cir. 1992) ("In this case, the absent tribes have an interest in preserving their own sovereign immunity, with its concomitant right not to have [its] legal duties judicially determined without consent."). Wichita and Affiliated Tribes, 788 F.2d 765, 777 n. 13 (D.C.Cir. 1986); Enterprise Management Consultants, Inc. v. U.S. ex rel. Hodel, 883 F.2d 890, 894 (10th Cir. 1989).

In affirming the dismissal of a declaratory judgment action brought by lessees of Indian land on the grounds that the Seneca Nation was an indispensable party, the Second Circuit in Fluent, supra, held that dismissal of an action for non-joinder of an interested party is virtually compelled where non-joinder is due to sovereign immunity: "[t]he rationale behind the emphasis placed on immunity in the weighing of rule 19 (b) factors is that the case is not one where some procedural defect such as venue precludes litigation of the case. Rather the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." 928 F.2d at 548 (citations omitted). For that reason, the

sovereign immunity of a necessary party can warrant dismissal even when no other forum is available for resolution of the claims at issue. Niagara Mohawk Power v. Tonawanda Band, 862 F.Supp. 995, 1002 (W.D.N.Y. 1994)(citing Fluent, 928 F.2d at 547). See, also, Wichita and Affiliated Tribes, supra, 788 F.2d at 777 (dismissing an action for non-joinder where there is no alternative forum is less troubling in cases where dismissal is mandated by tribal immunity than where litigation is precluded by some procedural defect). The assertion at Petition, p. 14, that there is no tribal court at the Tuscarora Nation and that the New York State Supreme Court is therefore the only forum available for resolution of the dispute between Petitioner and Respondent, is therefore not determinative of the dismissal issue.[5]

The Tuscarora Nation's interest in this action includes not having its sovereign right to regulate access and provision of electrical services to its territory adjudicated--or usurped--by the State courts without its consent. Under the caselaw pertaining specifically to the issue of Indian nations as necessary/ indispensable parties, the Appellate Division's determination that the action could not proceed under those circumstances was within its discretion. The Petition for Writ of Certiorari should

---

[5]Nor is that assertion accurate. The Tuscarora Chiefs in Council has the power to resolve disputes concerning the provision of electric service to its territory: "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. Nonjudicial tribal institutions have also been recognized as competent law-applying bodies." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66 (1978)(citations omitted, emphasis supplied).

therefore be denied.

**b. The Reasons Advanced by the Petitioner for Granting the Writ are Without Merit.**

**1. The dismissal does not conflict with Congress' express grant of jurisdiction pursuant to 25 U.S.C. section 233.**

25 U.S.C. Section 233 provides in pertinent part:

> The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State.

By its own terms, Section 233 merely grants the New York courts jurisdiction over civil actions in which some or all of the parties happen to be Indians to the same extent as those courts would have jurisdiction had all parties been non-Indian. It neither abrogates the New York Indian nations' treaty rights to self-government and exclusive jurisdiction over their internal affairs nor grants jurisdiction over such matters to the New York courts. Bowen v. Doyle, 880 F.Supp. 99, 115-123 (W.D.N.Y. 1995)(citing authorities). It guarantees the Petitioner precisely the same access to the New York courts in civil disputes arising under New York law as is enjoyed by non-Indians, and no litigant, Indian or non-Indian, has the right to insist that a New York court proceed to judgment in any action where

an Indian nation is a necessary party but cannot be joined do to sovereign immunity.

Petitioner complains that Section 233 "would be hollow if . . . defendants could evade the law simply by demanding that state courts require joinder of a tribe as a necessary party, no matter how remote a tribe's assertion of an interest in the outcome," [Petition, p. 12]; that the Appellate Division has violated the Section 233 jurisdictional grant by "invoking a procedural rule to mandate dismissal whenever an adverse party suggests a tribal interest might be affected," [Petition, p. 15]; and that "[b]y blindly invoking the necessary party doctrine, the Appellate Division has thwarted Congress' grant of jurisdiction under 25 U.S.C. section 233," [Petition, p. 19]. Those complaints both confuse the general grant of jurisdiction over cases involving individual Indians with the separate issue of Indian nations as indispensable parties and begs the question of whether the Tuscarora Nation's interest in regulating the provision of electric service to its territory makes it a necessary party in this case.

The Tuscarora Nation has a vital interest in its sovereign power to regulate access and the provision of electric or other services on its territory and would be inequitably affected by the adjudication in its absence of any claim in which that power is challenged. The Nation is therefore a necessary party. Because the Nation cannot be joined as a party due to sovereign immunity, the Appellate Division did not abuse its discretion in dismissing this action for failure to join an indispensable party. Appellant's misreading of the jurisdictional grant contained in 25 U.S.C. 233 cannot alter that fact.

**2. The type of remedy sought by Petitioner not alter the Tuscarora Nation's status as a necessary party.**

Petitioner does not deny that the Tuscarora Nation has an interest in regulating access and the provision of electric services to its territory. He argues only that that interest cannot be inequitably affected by this action because he seeks only money damages and not specific performance of the "Electric Service Proposal". [Petition, p. 13]. The type of remedy sought does not alter the fact that the Nation is a necessary party. A necessary party is anyone "who ought to be joined if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action. CPLR 1001(a). It is true that had Petitioner sought specific performance of the agreement as well as money damages, the Nation would fit the first definition of a "necessary party" as well as the second, but the type of relief sought has no affect on the Nation's status under the second definition, that is, its status as one "who might be inequitably affected by a judgment."

Like the Petitioner, the counterclaiming defendants in Niagara Mohawk v. Tonawanda Band, supra, sought to recover compensatory damages from NMPC for failure to provide electrical services. The court's problem was that it could award neither damages nor injunctive relief without first declaring the legal obligations of NMPC to supply the counterclaiming defendants with electricity. The nature of the relief the counterclaiming defendants sought in the event they prevailed was irrelevant to the Court's holding that the Tonawanda Band was an indispensable party to the counterclaims. What was relevant was the nature of the findings of fact and conclusions of law the court would be

constrained to make if they were to prevail at all. The point emphasized by the Tonawanda court was that any determination in favor of the non-moving defendants "would, in essence if not in substance, result in a holding that Niagara Mohawk has wrongfully refused to provide those applicants with electrical power and that prior approval by the Tonawanda Band is not required." Precisely the same can be said in this case.

In Anderson v. Town of Lewiston, supra, the Appellate Division upheld the lower court's dismissal of an action in which the plaintiff sought an injunction to prevent the defendant from complying with the Tuscarora consent requirement. The dismissal was upheld not only on the grounds that complete relief could not be accorded the plaintiff without the Indian Nation as a party but on the separate and independent grounds that "because a judgment in plaintiff's favor would challenge the power of the Indian Nation, the Indian nation might be 'inequitably affected' by this litigation." 244 A.D. at 966.

Petitioner's related argument that evidence that the Nation would be inequitably affected by a money judgment in this case is not in the Record, [Petition, p. 13], must also be rejected. First, the Nation's interest in the validity and enforceability of the consent requirement permeates the record in this case. The consent requirement itself is set forth in a letter from Chief Leo R. Henry to NMPC at R. 39. Second, Petitioner's claim that there is no indication in the record that the Nation did not consent to the contract for provision of electric service at issue in this case, [Petition, p. 13], is disingenuous at best. Petitioner has never disputed NMPC's assertion, [R. 235], that the Nation's consent to the electric service contract at issue had not been obtained. Petitioner himself has never claimed that the consent requirement was satisfied. Rather, his claims

against NMPC are predicated on the far more insidious proposition that the consent requirement can simply be ignored. See, e.g., R. 261 ("Niagara Mohawk's attempts to read some unwritten 'contingency' into the contract should be rejected").

Finally, any perceived void in the record concerning the interest of the Tuscarora Nation in this case has been more than adequately compensated for by the Nation's amicus curiae submissions at every stage of these proceedings. Given that the Appellant has persistently chosen to ignore the Nation's consent requirement, the fact that he also chooses to ignore the Nation's amicus submissions is hardly surprising, but he cannot reasonably expect this Court to do the same.

### 3. The Order of the Appellate Division does not violate the Supremacy Clause.

Petitioner argues that the dismissal of this action for failure to join an indispensable party violates the Supremacy Clause of the U.S. Constitution, characterizing it as an attempt by the Appellate Division "to dissociate [it]self from federal law or refuse to exercise jurisdiction bestowed by Congress because of disagreement with the federal law or refusal to recognize the superior authority of its source." [Petition, p. 15].[6] The cases cited by Petitioner do not support that argument. First, the cases cited concern refusals by state courts to entertain causes of action arising under substantive federal law. The only federal law even

---

[6]Petitioner raised this argument for the first time in his Application for Leave to Appeal to the Court of Appeals. Since leave to appeal was denied, no New York court has ruled on the issue.

remotely implicated in this case is 25 U.S.C. 233. Section 233 does not create federal causes of action. It merely confirms that the New York courts are not deprived of their jurisdiction over causes of action arising under New York law merely because one or more of the litigants happens to be an Indian. Second, the cases cited by Petitioner stand explicitly for the proposition that "[a] state court may not deny a federal right when the parties and controversy are properly before it." Howlett by and through Howlett v. Rose, 496 U.S. 356, 369 (1990). "[F]ederal law takes the state courts as it finds them" and the Supremacy Clause is not violated when a state court refuses jurisdiction because of a neutral procedural rule. id. at 372. Even if there were federal claims involved in this action, then, the Appellate Division's application of the State's neutral rules governing joinder of parties would not violate the Supremacy Clause.

**4. There has been no violation of the Constitutional rights of Native Americans.**

Petitioner also argues that the dismissal of this action for failure to join an indispensable party deprives Native Americans of their Constitutional right to due process and equal protection of the laws. [Petition, p. 15].[7] His attempt to shoe-horn this case into the Griffin and Boddie line of cases fails, however. First, this case is readily distinguishable from Griffin and Boddie in that Petitioner has been "deprived" only of the opportunity to turn his status as a willing party to an unenforceable contract into a gold mine. He does not face either

---

[7] See, note 6, supra.

incarceration (Griffin) or a lifetime trapped in a failed marriage (Boddie). Second, as discussed at Point II.b.1., supra, 25 U.S.C. 233 grants Native Americans precisely the same access to the New York courts as that accorded all other parties. Third, it is well-established that a dismissal of an action for failure to join an Indian nation as a party due to sovereign immunity "may leave a party with no forum for the party's claims." Fluent v. Salamanca Indian Lease Authority, 928 F.2d 542, 547 (2 Cir. 1991). The "due process" and "equal protection" issues raised by Petitioner are entirely illusory and provide no grounds for granting the Petition.

**5. The Order of the Appellate Division does not conflict with federal case law.**

The Seventh Circuit's holding in Thomas v. United States, 189 F.3d 662 (7 Cir. 1999), that a tribal governing body was not an indispensable party in an action by tribal members contesting the legality of the actions of federal officials in overturning the results of a tribal election depended upon the applicability in that case of the Indian Reorganization Act, 25 U.S.C. 461 et seq. ("IRA"), which explicitly qualified tribal sovereignty over its own affairs by granting exclusive authority over the administration and approval of elections to amend the tribal constitution to the Secretary of the Interior. It was solely because "the IRA explicitly reserves to the federal government the power to hold and approve the elections" and the issues raised in the case were therefore governed exclusively by federal and not by tribal law that the Seventh Circuit found that the nation's governing body was not an indispensable party.

There has been no federal action equivalent to the IRA to qualify the Tuscarora Nation's sovereign power to

regulate the provision of electric service on its territory. The only federal statute cited by the Appellant is 25 U.S.C. 233, which neither abrogates the Tuscarora Nation's treaty rights to self-government nor grants jurisdiction over such matters to the New York courts. See, discussion of 25 U.S.C. 233 at Point II.b.1., supra. There is therefore no conflict between this case and Thomas.

In Davis v. United States, 192 F.3d 951 (10 Cir. 1999), the Tenth Circuit reversed the District Court's dismissal of the complaint for failure to join an Indian nation as a party and remanded for consideration of the factors set forth in FRCP 19(b) because in dismissing the complaint, the District Court had apparently given no consideration to the particular facts of the case or interests at stake but had instead relied solely on the general principle that "there is very little room for balancing of other factors set out in Rule 19(b) because immunity may be viewed as one of those interests compelling in themselves". 192 F.3d at 960. In Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343 (2 Cir. 2000), the Second Circuit likewise vacated the District Court's dismissal of plaintiff's tort action against a museum (a privately-held corporation) located on the Pequot reservation for failure to join the Pequot Nation as a party on the grounds that the District Court had given no explanation of how the Pequot Nation's interests would be impaired by the continuation of the action in its absence, or even an explanation of what those interests were. 204 F.3d at 358-360

By contrast, the Appellate Division's references in its memorandum decision to its own recent decisions in Niagara Mohawk v. Anderson, 258 A.D.2d 958 (4 Dept. 1999) and Anderson v. Town of Lewiston, 244 A.D.2d 965 (4 Dept. 1997), decisions arising out of the same factual background, addressing the same issues and, for the

most part, involving the same parties, evidences the Appellate Division's thorough consideration and comprehension of the indispensable party factors set forth in CPLR 1001(b) as they pertain to this case. See, Points I, II.a., and II.b.2., supra.

## CONCLUSION

For the foregoing reasons, the Tuscarora Nation supports the Respondent in opposing the Petition for a Writ of Certiorari in this case.

DATED: Buffalo, New York
August 11, 2000

Respectfully Submitted,

HAROLD M. HALPERN
Counsel of Record
Borins, Halpern, Stromberg
& Paskowitz
KENDRA E. WINKELSTEIN,
Of Counsel
520 Brisbane Building
403 Main Street
Buffalo, New York 14203
(716) 852-8188

Attorneys for Amicus Curiae,
Tuscarora Nation of Indians

(4)

# No. 00-73

IN THE

# Supreme Court of the United States

October Term, 1999

JOSEPH M. ANDERSON,

*Petitioner,*

vs.

NIAGARA MOHAWK POWER CORPORATION,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FOURTH JUDICIAL DEPARTMENT.

## REPLY TO BRIEF IN OPPOSITION and TO THE BRIEF OF *AMICUS CURIAE*

JOSEPH E. ZDARSKY, ESQ.
*Counsel of Record*
ZDARSKY, SAWICKI & AGOSTINELLI
GERALD T. WALSH, ESQ., *Of Counsel*
404 Cathedral Place
298 Main Street
Buffalo, New York 14202
Telephone: (716) 855-3200

*Attorneys for Petitioner*

BATAVIA LEGAL PRINTING, INC.—Telephone (716) 768-2100

8 pp

# TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ..... ii

PRELIMINARY STATEMENT ..... 1

AN INDIAN NATION'S SOVEREIGNTY CANNOT BE USED BY NON-INDIAN LITIGANTS TO AVOID STATE COURT JURISDICTION UNDER 25 U.S.C. §233 ..... 1

## TABLE OF AUTHORITIES

Page(s)

**FEDERAL CASES**

*Ex Parte Young*, 209 U.S. 123 (1908) ..... 2

*Fluent v. Salamanca Lease Authority*, 928 F.2d 542 (2d Cir. 1991), *cert. denied*, 502 U.S.818 (1991) .. 3

*Kiowa Tribe v. Manufacturing Technologies*, 523 U.S.751 (1998) ..... 1, 2

*Niagara Mohawk v. Tonawanda Band of Seneca Indians*, 862 F. Supp. 995 (W.D.N.Y. 1994) ..... 3

*Niagara Mohawk v. Tonawanda Band of Seneca Indians*, 94 F. 3d 747 (2d Cir. 1996) ..... 3

*Oklahoma Tax Commission v. Potawatomi Indian Tribe*, 498 U.S. 505 (1991) ..... 2

*Puyallup Tribe v. Department of Game of the State of Washington*, 433 U.S. 165 (1977) ..... 2

*Santa Clara Pueblo v. Martinez*, 436 U.S.49 (1978) .... 1, 2

*Williams v. Lee*, 358 U.S. 217 (1959) ..... 5

**FEDERAL STATUTES**

25 U.S.C. §233 ..... 1, 5

Public Law 280 (25 U.S.C. §1322) ..... 5

**FEDERAL LEGISLATIVE HISTORY**

S. REP. NO. 721, 90th Cong. (1968), reprinted in 1968 U.S.C.C.A.N. 1837, 1865-566 .....5

## PRELIMINARY STATEMENT

Pursuant to Rule 15.6 of the Rules of the United States Supreme Court, petitioner Joseph M. Anderson submits this reply brief addressed to new points raised in the Respondent's Brief in Opposition and the Amicus Curiae Brief of the Tuscarora Nation of Indians.

## AN INDIAN NATION'S SOVEREIGNTY CANNOT BE USED BY NON-INDIAN LITIGANTS TO AVOID STATE COURT JURISDICTION UNDER 25 U.S.C. §233.

Essentially, the respondent and the Tuscarora Nation argue that the Tribe's sovereign immunity trumps Congress' grant of civil jurisdiction to New York Courts (25 U.S.C. §233).

If an Indian Tribe's immunity from suit in state court required *per se* joinder of a tribe in every suit for damages involving a member of an Indian nation, no Indian or other person would ever be able to enforce a contract or sue to seek payment for services or goods delivered on an Indian reservation. Respondent's overly broad application of the doctrine of sovereign immunity, as adopted by New York's Appellate Division, Fourth Department, violates Congress' express intent to provide access to state courts to resolve disputes arising on Indian reservations.

Because the sovereignty of Indian tribes is subject to Congressional control, the scope of tribal sovereign immunity is necessarily a matter of federal law. *See,e.g., Kiowa Tribe v. Manufacturing Technologies*, 523 U.S.751, 759 (1998) (directly addressing questions of tribal sovereign immunity) and *Santa Clara Pueblo v. Martinez*, 436 U.S.49, 55 (1978).

Despite the Court's concerns that its early precedents assumed immunity without extensive reasoning, and doubts concerning the wisdom of extending tribal immunity beyond the bounds of Indian lands, the Court held in *Kiowa* that Congress was the proper body to consider any abrogation of tribal immunity. In *Kiowa*, the court reiterated two fundamental principles regarding tribal sovereign immunity. First, like foreign sovereign immunity, tribal immunity is a matter of federal law. 523 U.S. at 759. Second, Congress, subject to constitutional limitations, can alter the limits of tribal sovereign immunity through explicit legislation, although the Supreme Court has traditionally taken the lead in drawing the bounds of tribal immunity. *Id.; see, also*, 523 U.S. at 760-766, (Stevens, J., dissenting).

*Kiowa* was an action for damages, not a suit for declaratory or injunctive relief. In *Puyallup Tribe v. Department of Game of the State of Washington*, 433 U.S. 165, 171 (1977), the Court reaffirmed that "whether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible." The Court cited *Puyallup* the next Term in finding a tribal governor not immune from a suit seeking declaratory and injunctive relief against enforcement of a tribal ordinance. *See, Santa Clara Pueblo v. Martinez*, 436 U.S. at 59. Justice Stevens has suggested that tribal sovereign immunity might not extend "to claims for prospective equitable relief against a Tribe." *Oklahoma Tax Commission v. Potawatomi Indian Tribe*, 498 U.S. 505, 515, (1991) (Stevens, J., concurring); *see, also, Ex Parte Young*, 209 U.S. 123 (1908).

There is no question, pursuant to *Kiowa*, that the Tuscarora Nation is immune from suits for damages. However, there is no authority from this Court to support the argument that the

doctrine of tribal sovereign immunity can be extended to require dismissal of private actions between tribal members and non-Indian litigants, if the Tribe does not consent, no matter how incidental the Tribe's interest.

Respondent cites *Fluent v. Salamanca Lease Authority*, 928 F.2d 542 (2d Cir. 1991), *cert. denied*, 502 U.S.818 (1991), where non-Indian lessees sought reformation of the Seneca Nation of Indians' agreement with an intermediary agency in a dispute directly involving the Nation's leases of land in the City of Salamanca, New York. In *Fluent*, Congress enacted legislation to renew the Seneca leases and landowners who objected sued the leasing authority established under such legislation to invalidate or reform the new leases. Since the Seneca Nation was a party to the leases, its interest was obvious. The Tuscarora Nation cites the district court's opinion in *Niagara Mohawk v. Tonawanda Band of Seneca Indians,* 862 F. Supp. 995 (W.D.N.Y. 1994) in support of its necessary party argument, but omits reference to the Court of Appeals' opinion, *Niagara Mohawk v. Tonawanda Band of Seneca Indians,* 94 F. 3d 747, 754 (2d Cir. 1996), dismissing Niagara Mohawk's declaratory judgment action because there was no actual controversy between the parties over the validity of the franchise agreement, without reaching the issues of sovereign immunity and whether the tribe was an indispensable party.

Petitioner Anderson has not brought any claim against the Tuscarora Nation, or sought to reform any Nation agreement or authorize any new entry onto Nation lands. Anderson only seeks damages from a New York utility company for breach of a distinct contract with him. Niagara Mohawk continues to provide service to other customers at Tuscarora and has hooked up other new customers at Tuscarora (R. 258-59, 283, 286, 310,

349, 362-388), notwithstanding Niagara Mohawk's unsuccessful litigation to reform its franchise agreement.

The gist of Anderson's complaint is that Niagara Mohawk contracted to provide him with expanded service, despite conflicting communications with Tuscarora Chiefs, consistent with Niagara Mohawk's duty to provide nondiscriminatory service to all customers at Tuscarora.[1] Anderson argues that Niagara Mohawk breached its agreement by adopting a "no new service" policy, less than two weeks later, thereby nullifying any tribal consent dispute. By entering into a separate service contract with Anderson, despite any perceived problems, Niagara Mohawk assumed the risk of nonperformance, much like a speculator who contracts to sell property in the future which he does not own today. A jury can determine whether any factual issues involving the alleged tribal consent requirement constitute a sufficient excuse for Niagara Mohawk's nonperformance.

The Tuscarora Nation's sovereign immunity is not a readily transferrable shield for use by non-Indian corporations to deflect legal challenges by Indian citizens. By attempting to expand tribal sovereign immunity through a procedural device which rarely results in dismissal in non-Indian contexts, the respondent and the Tuscarora Nation highlight the important federal question raised herein, *i.e.*, whether an Indian Nation's

---

1 In response to Anderson's record reference to Tuscarora Chief Webster Cusick's sworn disavowal of any tribal consent provision (R. 434-463) and respondent's admission of similar communications with Chief Cusick and Tuscarora Chief Arnold Hewitt (R. 167-168, 283, 314), Niagara Mohawk cannot cite any contrary sworn testimony or other admissible evidence from the record, but merely refers to an unattributed newspaper notice, off-reservation newspaper articles, and a law review writer's opinion of Anderson (See Brief in Opposition, 15-16).

sovereign immunity can be used to deny justice to persons or corporations transacting business on Indian reservations.

Unlike the 1968 amendments to Public Law 280 (See 25 U.S.C. §1322), which gave certain western tribes veto power over Congress' consent to state civil court jurisdiction [see S. REP. NO. 721, 90th Cong. (1968), reprinted in 1968 U.S.C.C.A.N. 1837, 1865-566], Congress' grant of civil jurisdiction to New York courts in 25 U.S.C. §233 was not conditioned on the consent of the Iroquois Nations. Just as the Court granted certiorari in *Williams v. Lee*, 358 U.S. 217, 218 (1959) to reverse a state court's doubtful exercise of civil jurisdiction over a private reservation contract dispute in the absence of an express federal grant, the Court should grant certiorari to consider the Appellate Division's summary denial of a Native American's access to judicial process where Congress has granted such jurisdiction, pursuant to 25 U.S.C. §233.

Dated: August 23, 2000

Respectfully submitted,

JOSEPH E. ZDARSKY, ESQ.
*Counsel of Record*
ZDARSKY, SAWICKI & AGOSTINELLI
GERALD T. WALSH, ESQ., *Of Counsel*
404 Cathedral Place
298 Main Street
Buffalo, New York 14202
Telephone: (716) 855-3200

*Attorneys for Petitioner*